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HLC v PTL & Anor

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HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO WA-33–30–01 OF 2021
EVROL MARIETTE PETERS J
15 APRIL 2024

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Family Law — Divorce — Irretrievable breakdown of marriage — Petition by petitioner-wife claiming maintenance for herself and two children, equal division of matrimonial assets and damages from co-respondent — Cross-petition by respondent-husband claiming specific monetary claims pursuant to marital agreement and return of monies and jewellery — Whether marital agreement valid and binding — Whether breakdown of marriage due to adultery between respondent and co-respondent which petitioner found intolerable — Whether breakdown of marriage due to abuse/sexual abuse by respondent — Whether breakdown of marriage due to petitioner's alcoholism — Whether petitioner fulfilled 'means and needs' test to justify her claim to lump sum/monthly maintenance — Whether respondent obliged to pay child maintenance — Whether respondent entitled to have access to child — Whether petitioner entitled to half of value of immoveable properties — Whether petitioner entitled to half of monies in respondent's employees provident fund and fixed deposits — Whether petitioner entitled to car which belonged to respondent — Whether petitioner entitled to half of value of companies' assets — Whether respondent entitled to recovery of jewellery — Law Reform (Marriage and Divorce) Act 1976 ss 54(1)(a), 58(3) & 95

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This was the petitioner-wife's ('petitioner') petition for divorce, maintenance for herself and two children, equal division of matrimonial assets and damages from the co-respondent. The respondent-husband ('respondent') cross-petitioned for divorce, specific monetary claims pursuant to a marital agreement dated 9 August 1997 entered into between the parties ('the marital agreement'), and the return of monies and jewellery. The petitioner was a Singaporean citizen while the respondent was a Malaysian citizen, and their marriage was registered in July 1997. At the time of their marriage, the petitioner was already a mother to a two-year-old ('SP3') from her previous marriage. The parties had five children altogether, comprising three sons aged 26, 25 and 18, and two daughters aged 23 and 21. Their eldest child, WYL, had special needs. In October 2020, citing adultery and unreasonable behaviour, the petitioner left the matrimonial home with the children and relocated to an apartment. In January 2021, the petitioner initiated divorce proceedings, amending her divorce petition in November 2022 ('the divorce petition'). The issues for determination were: (a) whether the marital

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agreement was valid and binding; (b) whether the breakdown of the marriage was due to the adultery between the respondent and the co-respondent which petitioner found intolerable; (c) whether the breakdown of the marriage was due to the abuse/sexual abuse by the respondent; (d) whether the breakdown of marriage was due to petitioner's alcoholism; (e) whether the petitioner had fulfilled the 'means and needs' test to justify her claim to lump sum/monthly maintenance; (f) whether the respondent was obliged to pay child maintenance; (g) whether the respondent was entitled to have access to WYL; (h) whether the petitioner was entitled to half of the value of immoveable properties; (i) whether the petitioner was entitled to half of the monies in the respondent's employees provident fund ('EPF') and fixed deposits; (j) whether the petitioner was entitled to the Porsche which belonged to the respondent; (k) whether the petitioner was entitled to half of the value of the companies' assets; and (l) whether the respondent was entitled to the recovery of the jewellery.

Held, granting the divorce with the decree nisi made absolute immediately:

(1) The marital agreement was executed post-registration of the marriage, negating the premise of any form of pre-marital pressure. Given this timing, the petitioner, already legally wed, possessed the autonomy to refuse to sign the agreement, which consequently undermined her claim of coercion. The petitioner's educational background further weakened her assertion of ignorance, duress and involuntariness. It was unbelievable that someone of her standing was forced to consent to the terms of the marital agreement without understanding the implications thereof. Moreover, with the petitioner's initials on every page and the signatures of four witnesses, it was implausible to contend that she was pressured or coerced into signing it. The petitioner had not sufficiently demonstrated that she did not sign the document voluntarily (see paras 21–23 & 26).

(2) Clauses 3, 4 and 5 of the marital agreement were egregiously unreasonable, unfair, and fundamentally inequitable. The parties were not allowed to oust the protective jurisdiction of the court over their children in matters of custody and maintenance. Hence the terms of the marital agreement referring to child maintenance could not be upheld. Clause 6, by its nature, embodied the petitioner's acquiescence to adultery committed by the respondent. The petitioner had voluntarily signed a marital agreement wherein she explicitly accorded permission for the respondent to maintain a relationship with one mistress at any given time. Given that the petitioner had consented to the provision in cl 6 of the marital agreement, her assertion that the alleged adultery between the respondent and the co-respondent had caused the irretrievable breakdown of the marriage, was untenable (see paras 31, 46, 48 & 51).

(3) The screenshots of video calls and WhatsApp messages ('the screenshots') adduced by the petitioner could not be accepted as it consisted of mere screenshots taken by the petitioner of the video calls, and WhatsApp messages found on the respondent's cell phone. No evidence was led to indicate what type of device the petitioner had used to take such screenshots, as such device was never adduced. Given that they were mere screenshots of the video calls and WhatsApp messages, they constituted secondary evidence. Moreover, while the exchanged messages purportedly between the respondent and the co-respondent were indeed explicit and sexually charged, they lacked any direct indication of actual sexual intercourse. Such behaviour fell short of constituting adultery as stipulated in s 54(1)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). Adultery did not serve as the cause for the irretrievable breakdown of the marriage and the petitioner had not found it intolerable as stipulated in cl 6 of the marital agreement. The automatic granting of damages was not guaranteed. The court retained discretion in deciding whether damages should be awarded, as indicated by the word 'may' in s 58(3) of the LRA (see paras 69–70, 88–89 & 100–101).

(4) The petitioner's claims of abuse from the respondent were unacceptable in the absence of concrete evidence. The testimonies provided by the children was dubious and lacked credibility. Moreover, at the time of filing the divorce petition in January 2021, the petitioner had not referred to any allegation of abuse. In November 2022, the petitioner sought to amend her divorce petition to include allegations of abuse. This timeline suggested that the alleged abuse was not at all the cause of the irretrievable breakdown of the marriage. The allegations brought forth were not grounded in truth but were instead a deliberate construct by the petitioner. This strategy not only aimed at strengthening her case through unfounded claims but also involved coaching the children into supporting this narrative, thereby manipulating the legal process to her advantage. Although the children had testified against the respondent, aligning with the petitioner's narrative, they did not intrinsically strengthen the petitioner's position. On the contrary, their testimonies were unreliable due to being largely irrelevant, implausible, contradictory and evidently biased (see paras 103, 110, 121, 129 & 138).

(5) While there was no conclusive evidence establishing the petitioner as an alcoholic, the evidence adduced pointed to her penchant for alcohol consumption as the petitioner felt constrained by the respondent's attempts to dictate her lifestyle choices. The marriage had run its natural course. The petitioner initially viewed the union as a means of ensuring financial stability for herself and SP3. Despite subsequently having five children with the respondent, she remained in the marriage primarily for convenience and financial security. Conversely, the respondent admitted to marrying the petitioner more out of a sense of duty rather than

genuine affection as she had become pregnant out of wedlock. While neither adultery nor abuse was proved, both parties bore equal responsibility for the irretrievable breakdown of their marriage (see paras 143–144, 146 & 148).

(6) The lump-sum payment of RM8m by the petitioner appeared excessive and lacked basis. The petitioner had not provided adequate justification for this figure beyond asserting the respondent's alleged history as a negligent payer and potential evasion of monthly spousal maintenance obligations. It could not be agreed with the petitioner's request for monthly maintenance of RM18,000, considering that following the divorce, the petitioner would no longer be obligated to fulfil the role of a high-profile businessman's wife, entertaining guests and maintaining a lavish lifestyle. A monthly spousal maintenance amount of RM10,000 was both reasonable and equitable, especially considering that the petitioner had, during the hearing of the divorce petition, agreed to accept such sum (see paras 152, 164 & 174).

(7) A monthly sum of RM3,000 for each child was a fair and reasonable sum. Section 95 of the LRA did not encompass the expenses related to education and healthcare for the two sons. These additional costs were to be entirely shouldered by the respondent, albeit contingent upon his consent. The measure was instituted to prevent potential instances of financial exploitation by the petitioner (see paras 175, 178 & 180).

(8) Granting reasonable access to the respondent would not be appropriate. Given that the respondent faced charges related to the parties' daughters, and considering WYL's status as a special needs child, supervised access by the petitioner would be essential. In light of the ongoing criminal proceedings against the respondent, it was imperative to minimise contact between the respondent and the petitioner, especially since she was a potential witness in these proceedings. Therefore, until the criminal proceedings were resolved, access to WYL should be withheld. The respondent retained the right to apply to court to vary this provision of the court order once the criminal case had been concluded (see paras 182–183).

(9) Acknowledging the petitioner's significant role in caring for the children and managing the household, particularly in the matrimonial home ie property No 1, she was awarded 50% of its current value. For properties Nos 2 to 8, the petitioner should be entitled to 30% of the realisable value or equity in these properties. As far as properties Nos 9 to 12 were concerned, the petitioner's entitlement extended to 15% of the respondent's share, while for properties Nos 13 to 21, it amounted to only 5% of the respondent's share. Properties Nos 22 to 36 were not eligible for division in favour of the petitioner. Given the deteriorating state of the marriage at the time of acquisition, coupled with minimal

contribution and substantial outstanding loans, no allocation was justified. It was also mandated for equal sharing of the valuation costs for the immovable properties between the petitioner and respondent. In the event of disposal by the respondent of any of the immovable properties, the petitioner was to equally share the associated costs and fees (see paras 194–198).

(10) Taking into account the duration of the marriage and the petitioner's contributions to the household and family life, the petitioner was justly entitled to a 25% share of the monies in the fixed deposit bank accounts as of 20 February 2024. Further, the continuous contributions throughout the marriage had classified the monies in the EPF as a matrimonial asset. Therefore, it was subject to division in accordance with s 53A of the Employees Provident Fund Act 1991, reflecting the joint financial partnership inherent in the matrimonial relationship (see paras 205–206).

(11) The petitioner's persistent demand for the Porsche was unjustified. The respondent had communicated the importance of the Porsche in his professional endeavours as a businessman. Moreover, the petitioner was afforded the freedom to select from an array of vehicles owned by the respondent. The Kia Sportage emerged as a notably adequate choice for the petitioner, especially since the petitioner would assume sole responsibility for its maintenance, post-divorce (see paras 211 & 213–215).

(12) The petitioner's claims on the assets owned by companies in which the respondent held shares were untenable as the assets in question were legally owned by the companies themselves. However, the respondent's shares in the companies should be subject to equitable division. 20% of the value of the respondent's shares shall be allocated to the petitioner, with this arrangement also encompassing any shares the petitioner already possessed within any of the companies (see para 217 & 219).

(13) The respondent's contention that there was jewellery taken by the petitioner from the safe in the matrimonial home which the respondent now demanded, was bereft of merit as there was no proof whatsoever of the existence of such jewellery, much less that the petitioner had taken them. As such, this claim could not be allowed (see para 221).

[Bahasa Malaysia summary

Ini adalah permohonan perceraian oleh pempetisyen-isteri ('pempetisyen'), termasuk nafkah untuk dirinya dan dua anak mereka, pembahagian harta sepencarian secara sama rata, serta ganti rugi daripada responden bersama. Pempetisyen-suami ('responden') pula memfailkan petisyen balas perceraian, tuntutan kewangan tertentu berdasarkan perjanjian perkahwinan bertarikh 9 Ogos 1997 antara pihak-pihak ('perjanjian perkahwinan'), dan pemulangan

wang serta barang kemas. Pempetisyen adalah seorang warganegara Singapura manakala responden adalah seorang warganegara Malaysia, dan perkahwinan mereka didaftarkan pada bulan Julai 1997. Pada waktu perkahwinan mereka, pempetisyen sudah mempunyai seorang anak berusia dua tahun ('SP3') hasil daripada perkahwinan sebelumnya. Mereka memiliki lima orang anak secara keseluruhan, terdiri dari tiga anak lelaki berumur 26, 25 dan 18, serta dua anak perempuan berumur 23 dan 21. Anak sulung mereka, WYL, adalah berkeperluan khas. Pada bulan Oktober 2020, dengan alasan berlakunya perzinaan dan kelakuan tidak wajar, pempetisyen meninggalkan rumah perkahwinan bersama anak-anak dan berpindah ke sebuah apartmen. Pada Januari 2021, pempetisyen memulakan prosiding perceraian dan telah meminda permohonan tersebut pada bulan November 2022 ('permohonan perceraian'). Isu-isu yang perlu diputuskan adalah: (a) sama ada perjanjian perkahwinan itu sah dan mengikat; (b) sama ada kepecahbelahan perkahwinan disebabkan oleh perzinaan antara responden dan responden bersama yang mana pempetisyen tidak boleh terima; (c) sama ada kepecahbelahan perkahwinan disebabkan oleh penderaan/penderaan seksual oleh responden; (d) sama ada kepecahbelahan perkahwinan disebabkan oleh masalah alkoholisme pempetisyen; (e) sama ada pempetisyen telah memenuhi ujian 'keperluan dan kemampuan' untuk membenarkan tuntutannya terhadap nafkah secara sekaligus atau bulanan; (f) sama ada responden wajib membayar nafkah anak; (g) sama ada responden berhak untuk mempunyai akses kepada WYL; (h) sama ada pempetisyen berhak kepada separuh daripada nilai harta tidak alih; (i) sama ada pempetisyen berhak kepada separuh daripada wang dalam wang simpanan pekerja ('EPF') dan deposit tetap responden; (j) sama ada pempetisyen berhak kepada kereta Porsche yang dimiliki oleh responden; (k) sama ada pempetisyen berhak kepada separuh daripada nilai aset syarikat; dan (l) sama ada responden berhak menuntut semula barang kemas tersebut.

Diputuskan, membenarkan perceraian dengan dekri nisi dibuat mutlak serta-merta:

(1) Perjanjian perkahwinan dilaksanakan selepas pernikahan didaftarkan, menafikan premis sebarang bentuk tekanan pra-perkahwinan. Mengikut masa ini, pempetisyen, yang sudah sah berkahwin, mempunyai kebebasan untuk menolak untuk menandatangani perjanjian tersebut, yang seterusnya menjejaskan tuntutannya tentang paksaan. Latar belakang pendidikan pempetisyen melemahkan lagi dakwaannya tentang ketidaktahuan, tekanan, dan ketidakrelaannya. Tidak boleh dipercayai bahawa seseorang dalam kedudukannya terpaksa menyetujui terma perjanjian perkahwinan tanpa memahami implikasinya. Selain itu, dengan inisial pempetisyen pada setiap halaman dan tandatangan empat saksi, adalah tidak mungkin untuk mengemukakan bahawa dia dipaksa atau ditekan untuk menandatanganinya. Pempetisyen tidak menunjukkan dengan cukup bahawa dia tidak menandatangani

dokumen itu secara sukarela (lihat perenggan 21–23 & 26).

(2) Klausa 3, 4, dan 5 dalam perjanjian perkahwinan adalah sangat tidak munasabah, tidak adil, dan pada asasnya tidak seimbang. Pihak-pihak tidak dibenarkan untuk mengecualikan bidang kuasa perlindungan mahkamah ke atas anak-anak mereka dalam perkara hak penjagaan dan nafkah anak. Oleh itu, terma perjanjian perkahwinan yang merujuk kepada nafkah anak tidak boleh dipertahankan. Klausa 6, pada dasarnya, merangkumi persetujuan pempetisyen terhadap perzinaan yang dilakukan oleh responden. Pempetisyen telah secara sukarela menandatangani perjanjian perkahwinan di mana dia secara eksplisit memberi izin kepada responden untuk mempunyai satu perempuan simpanan pada satu masa. Memandangkan pempetisyen telah menyetujui peruntukan dalam klausa 6 perjanjian perkahwinan, dakwaannya bahawa perzinaan antara responden dan pihak ketiga menyebabkan kepecahbelahan perkahwinan yang tidak dapat dipulihkan, adalah tidak dapat diterima (lihat perenggan 31, 46, 48, & 51).

(3) Tangkap layar panggilan video dan mesej WhatsApp ('tangkap layar') yang dikemukakan oleh pempetisyen tidak boleh diterima kerana ia hanya tangkap layar yang diambil oleh pempetisyen dari panggilan video dan mesej WhatsApp yang terdapat di telefon bimbit responden. Tiada keterangan diberikan untuk menunjukkan jenis alat yang digunakan oleh pempetisyen untuk mengambil tangkap layar tersebut, kerana alat tersebut tidak pernah dikemukakan. Memandangkan ia hanya tangkap layar panggilan video dan mesej WhatsApp, ia adalah bukti sekunder. Lebih-lebih lagi, walaupun mesej yang ditukar antara responden dan pihak ketiga sememangnya eksplisit dan berunsur seksual, mereka tidak mempunyai sebarang petunjuk langsung tentang hubungan seksual yang sebenar. Tingkah laku sedemikian tidak mencukupi untuk menjadi zina seperti yang ditetapkan dalam s 54(1)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('LRA'). Perzinaan tidak menjadi punca kepada kepecahbelahan perkahwinan yang tidak dapat dipulihkan dan pempetisyen tidak merasakan bahawa ia tidak boleh diterima seperti yang ditetapkan dalam klausa 6 perjanjian perkahwinan. Pemberian ganti rugi automatik tidak dijamin. Mahkamah mempunyai budi bicara dalam menentukan sama ada ganti rugi harus diberikan, seperti yang dinyatakan oleh perkataan 'boleh' dalam s 58(3) LRA (lihat perenggan 69–70, 88–89 & 100–101).

(4) Dakwaan pempetisyen tentang penderaan oleh responden tidak boleh diterima tanpa keterangan konkrit. Keterangan yang diberikan oleh anak-anak adalah meragukan dan tidak mempunyai kredibiliti. Selain itu, pada masa memfailkan petisyen perceraian pada Januari 2021, pempetisyen tidak merujuk sebarang dakwaan penderaan. Pada bulan

November 2022, pempetisyen memohon untuk meminda petisyen perceraiannya untuk memasukkan dakwaan penderaan. Garis masa ini menunjukkan bahawa dakwaan penderaan tidak sama sekali menjadi punca kepada kepecahbelahan perkahwinan yang tidak dapat dipulihkan. Dakwaan yang dibawa adalah tidak berasas tetapi sebaliknya adalah ciptaan sengaja oleh pempetisyen. Strategi ini tidak hanya bertujuan untuk menguatkan kesnya melalui dakwaan tanpa asas tetapi juga melibatkan pemesongan anak-anak dalam menyokong naratif ini, oleh itu memanipulasi proses undang-undang untuk kelebihannya. Walaupun anak-anak telah memberi keterangan menentang responden, menyelaraskan dengan naratif pempetisyen, mereka tidak menguatkan kedudukan pempetisyen secara intrinsik. Sebaliknya, keterangan mereka tidak boleh dipercayai kerana sebahagian besarnya tidak relevan, tidak mungkin, bercanggah dan jelasnya berat sebelah (lihat perenggan 103, 110, 121, 129 & 138).

(5) Walaupun tiada keterangan muktamad yang membuktikan bahawa pempetisyen seorang alkoholik, keterangan yang dikemukakan menunjukkan kecenderungannya terhadap pengambilan alkohol kerana pempetisyen merasa tertekan oleh usaha responden untuk mengawal pilihan gaya hidupnya. Perkahwinan tersebut telah mencapai hadnya. Pempetisyen pada mulanya melihat perkahwinan itu sebagai cara untuk memastikan kestabilan kewangan untuk dirinya dan SP3. Walaupun kemudian mempunyai lima anak dengan responden, dia tetap berada dalam perkahwinan itu terutama untuk kesenangan dan keselamatan kewangan. Sebaliknya, responden mengakui menikahi pempetisyen lebih kerana rasa tanggung jawab daripada kasih sayang tulus kerana dia telah mengandung luar nikah. Walaupun tidak ada perzinaan ataupun penderaan yang dibuktikan, kedua-dua pihak sama-sama bertanggungjawab atas kepecahbelahan perkahwinan mereka yang tidak dapat dipulihkan (lihat perenggan 143–144, 146 & 148).

(6) Tuntutan pembayaran sekaligus RM8 juta oleh pempetisyen kelihatan berlebihan dan tidak berasas. Pempetisyen tidak memberikan justifikasi yang mencukupi untuk angka ini selain menegaskan sejarah responden sebagai pembayar yang cuai dan potensi pengelakan kewajipan nafkah bulanan bagi pasangan. Tidak boleh dipersetujui dengan permintaan pempetisyen untuk nafkah bulanan sebanyak RM18,000, memandangkan bahawa selepas perceraian, pempetisyen tidak lagi wajib memenuhi peranannya sebagai isteri seorang ahli perniagaan berprofil tinggi, melayani tetamu dan mengekalkan gaya hidup mewah. Jumlah nafkah bulanan sebanyak RM10,000 adalah munasabah dan saksama, terutamanya memandangkan bahawa pempetisyen telah, semasa perbicaraan petisyen perceraian, bersetuju untuk menerima jumlah tersebut (lihat perenggan 152, 164 & 174).

(7) Jumlah bulanan RM3,000 untuk setiap anak adalah jumlah yang adil dan munasabah. Seksyen 95 LRA tidak merangkumi perbelanjaan yang berkaitan dengan pendidikan dan penjagaan kesihatan untuk dua anak lelaki tersebut. Kos tambahan ini harus sepenuhnya ditanggung oleh responden, walaupun bergantung kepada persetujuannya. Langkah ini diambil untuk mengelakkan potensi keadaan eksploitasi kewangan oleh pempetisyen (lihat perenggan 175, 178 & 180).

(8) Memberikan akses yang munasabah kepada responden adalah tidak sesuai. Memandangkan responden menghadapi tuduhan berkaitan dengan anak perempuan pihak-pihak tersebut, dan memandangkan status WYL sebagai anak dengan keperluan khas, akses diawasi oleh pempetisyen adalah penting. Memandangkan prosiding jenayah yang sedang berjalan terhadap responden, adalah penting untuk meminimumkan kontak antara responden dan pempetisyen, terutama kerana dia adalah saksi berpotensi dalam prosiding tersebut. Oleh itu, sehingga prosiding jenayah diselesaikan, akses kepada WYL harus disekat. Responden mempunyai hak untuk memohon kepada mahkamah untuk mengubah ketetapan perintah mahkamah ini setelah kes jenayah tersebut diselesaikan (lihat perenggan 182–183).

(9) Mengakui peranan penting pempetisyen dalam menjaga anak-anak dan menguruskan rumah tangga, terutama di rumah perkahwinan iaitu harta No 1, dia diberikan 50% dari nilai semasanya. Untuk harta-harta No 2 hingga 8, pempetisyen berhak kepada 30% daripada nilai realisasi atau ekuiti dalam harta tersebut. Bagi harta-harta No 9 hingga 12, hak pempetisyen meluas kepada 15% dari bahagian responden, manakala bagi harta-harta No 13 hingga 21, ia hanya berjumlah 5% daripada bahagian responden. Harta-harta No 22 hingga 36 tidak layak untuk pembahagian memihak kepada pempetisyen. Memandangkan keadaan perkahwinan yang semakin merosot semasa pemerolehan, ditambah dengan sumbangan yang minima dan pinjaman yang besar yang masih ada, tiada pembahagian yang dibenarkan. Adalah juga dimandatkan untuk perkongsian kos penilaian bagi harta tidak alih antara pempetisyen dan responden. Jika berlaku pelupusan oleh responden atas mana-mana harta tidak alih, pempetisyen harus berkongsi sama rata kos dan yuran yang berkaitan (lihat perenggan 194–198).

(10) Mengambil kira tempoh perkahwinan dan sumbangan pempetisyen kepada rumah tangga dan kehidupan keluarga, pempetisyen berhak dengan adil kepada 25% dari wang dalam akaun simpanan tetap pada 20 Februari 2024. Selanjutnya, sumbangan berterusan sepanjang perkahwinan telah mengklasifikasikan wang dalam EPF sebagai aset perkahwinan. Oleh itu, ia tertakluk kepada pembahagian mengikut s 53A Akta Simpanan Pekerja 1991, yang mencerminkan perkongsian

kewangan bersama dalam hubungan perkahwinan (lihat perenggan 205–206).

(11) Tuntutan berterusan pempetisyen untuk Porsche adalah tidak berasas. Responden telah menyampaikan kepentingan Porsche dalam usaha profesionalnya sebagai seorang ahli perniagaan. Selain itu, pempetisyen diberikan kebebasan untuk memilih dari pelbagai kenderaan milik responden. Kia Sportage muncul sebagai pilihan yang cukup memadai untuk pempetisyen, terutama kerana pempetisyen akan memikul seluruh tanggung jawab untuk penyelenggaraannya, selepas perceraian (lihat perenggan 211 & 213-215).

(12) Tuntutan pempetisyen atas aset yang dimiliki oleh syarikat di mana responden memegang saham tidak dapat diterima kerana aset tersebut secara sah dimiliki oleh syarikat-syarikat itu sendiri. Walau bagaimanapun, saham responden dalam syarikat-syarikat tersebut harus dibahagikan secara saksama. 20% daripada nilai saham responden akan diperuntukkan kepada pempetisyen, dengan atur cara ini juga merangkumi sebarang saham yang sudah dimiliki oleh pempetisyen dalam mana-mana syarikat tersebut (lihat perenggan 217 & 219).

(13) Dakwaan responden bahawa terdapat barang kemas yang diambil oleh pempetisyen dari peti besi di rumah perkahwinan yang kini dituntut oleh responden, adalah tidak berasas kerana tiada bukti sama sekali tentang kewujudan barang kemas tersebut, apatah lagi bahawa pempetisyen telah mengambilnya. Oleh itu, tuntutan ini tidak boleh diterima (lihat perenggan 221).]

Cases referred to

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Annathurai a/l Venkidasalam v Vani a/p Welluven [2023] MLJU 2442; [2023] CLJU 2191, CA (folld)
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K v K (ancillary relief: prenuptial agreement) [2003] 1 FLR 120 (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457; [1998] 1 LNS 340, HC (refd)
Lim Thian Kiat v Teresa Haesook Lim & Anor [1998] 2 MLJ 102, HC (refd)
Livingstone-Stallard v Livingstone-Stallard [1974] 2 All ER 766 (refd)
M v M (prenuptial agreement) [2002] 1 FLR 654 (folld)
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MacLeod v MacLeod [2008] UKPC 64, PC (refd)
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Muthuraja a/l Suppiah v Sukumar Kokila [2020] MLJU 2337; [2020] 1 LNS 2183; [2020] 1 MLRHU 1820, HC (folld)
P (A Child: Remote Hearing), Re [2020] EWFC 32 (folld)
PP v Kuala Dimensi Sdn Bhd & Ors [2021] 2 MLJ 469, FC (folld)
PP v Balveer Singh a/l Mahindar Singh [2009] 1 MLJ 386; [2008] 1 LNS 498, HC (refd)
PP v Hassan Jafarpour [2019] 5 MLJ 350; [2019] 9 CLJ 216, CA (refd)
PP v Mohammad Terang bin Amit [1999] 1 MLJ 154; [1999] 5 CLJ 156, HC (refd)
PP v Paneerselvan & Ors [1991] 1 MLJ 106; [1990] 2 CLJ 833; [1990] 2 CLJ Rep 804, HC (refd)
PP v Teo Eng Chan & Ors [1988] 1 MLJ 156; [1988] 1 CLJ 425; [1988] 2 CLJ Rep 793 (refd)
Radmacher (formerly Granatino) v Granatino [2010] UKSC 42, SC (refd)
Borthwick, decd Borthwick and another, In Re v Beauvais and others [1949] Ch 395, Ch D (refd)
Richardson v Mellish [1824–34] All ER Rep 258 (refd)
Sahari bin Masrom v PP [2009] 2 MLJ 859; [2008] 1 LNS 584, HC (refd)
Shameni Pillai a/p PB Rajedran v S Arulselvam a/l Sanggilly and Rafidah bt Mat Taib (responden bersama) [2010] MLJU 1333; [2011] 6 CLJ 782, HC (folld)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Teoh Meng Kee v PP [2014] 5 MLJ 741; [2014] 7 CLJ 1034, CA (refd)
Tong Seak Kan & Anor v Loke Ah Kin & Anor [2014] 5 MLRH 710, HC (refd)
Unsung bin Rasad v PP [2019] 4 MLJ 448; [2019] 1 LNS 662, CA (refd)
V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474, HC (folld)
VPU v VPT [2021] SGHCF 11 (refd)
W v H [1987] 2 MLJ 235 (refd)
YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad [2015] 3 MLJ 364; [2015] 2 MLRA 492, CA (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(b), (e)
Employees Provident Fund Act 1991 s 53A
Evidence Act 1950 ss 63, 64, 65, 90A(2), 103, 114A, 134, 157
Law Reform (Marriage and Divorce) Act 1976 ss 47, 58, 58(3), 54(1)(a), (1)(b), 76, 76(2), 77(1), 78, 92, 93, 95
Penal Code [IN] s 497
Sexual Offences Against Children Act 2017 ss 14(a), 16(1)

M Kamalam (with Eugene Teo) (Kamalam & Assoc) or the petitioner.
Lee Sok Wah (with Nur Amira Hidayah Razali) (Lee Sok Wah & Co) for the respondent and co-respondent.

Evrol Mariette Peters J:

INTRODUCTION

[1] This was the petitioner-wife's petition for divorce, maintenance for herself and two children, equal division of matrimonial assets, and damages from the co-respondent; whilst the respondent-husband cross-petitioned for divorce, specific monetary claims pursuant to a marital agreement, and the return of monies and jewellery.

[2] Given the privacy of parties and sensitivity of issues in these proceedings, the petitioner, respondent, and co-respondent have been anonymised respectively as HLC, PTL, and GEN.

THE FACTUAL BACKGROUND

[3] The petitioner, a Singaporean citizen, and respondent, a Malaysian (collectively 'the parties'), were aged 54 and 62, respectively at the time of the hearing of the divorce petition. Their marriage was registered in July 1997. Notably, at the time of their marriage, the petitioner was already a mother to a two-year-old ('TIF'), from her previous marriage.

[4] The parties had five children together, comprising three sons aged 26, 25, and 18 respectively, and two daughters aged 23 and 21. Notably their eldest child, WYL, has special needs.

[5] Except for WYL, TIF, and the other children (collectively 'the children') testified in favour of the petitioner. TIF testified as SP3, while the parties' two sons, aged 25 and 18 testified respectively as SP5 and SP4. Additionally, their daughters, aged 23 and 21, testified on behalf of the petitioner, respectively as SP1 and SP2.

[6] In October 2020, citing adultery and unreasonable behaviour, the petitioner left the matrimonial home with the children, and relocated to an apartment at Plaza Berjaya ('the Plaza Berjaya apartment'), which was registered in the names of the respondent and his business partner, Lim Bee Suan.

[7] Subsequently, in January 2021, the petitioner initiated divorce proceedings, amending her divorce petition in November 2022 ('the divorce petition'). In response, the respondent, in December 2022, filed his reply to the amended divorce petition.

THE ISSUES

[8] The issues that had to be addressed by this court were as follows:

(a) whether a marital agreement dated 9 August 1997 entered into between the parties, was valid and binding;

(b) spousal maintenance — in the deliberation of whether spousal maintenance should be awarded, it was imperative to consider the following issues:

  (i) whether the breakdown of the marriage was due to adultery between the respondent and co-respondent, and even if it was, whether the petitioner had found such adultery intolerable;

  (ii) whether breakdown of the marriage was due to the respondent's unreasonable behaviour, in the form of abuse towards the petitioner and the children, and sexual abuse towards the parties' daughters;

  (iii) whether breakdown of the marriage was due to the petitioner's unreasonable behaviour, in the form of alcoholism; and

  (iv) whether the petitioner had fulfilled the 'means and needs' test to justify her claim to lumpsum/ monthly maintenance.

(c) child maintenance — whether the respondent was obligated to maintain two of the parties' children, namely WYL who is their special needs child, and SP4 who was 18 years old at the time of the hearing of the divorce petition, and still studying;

(d) child access — whether the respondent was entitled to have access to WYL; and

(e) the matrimonial assets — with regard to the matrimonial assets, the issue was whether the petitioner was entitled to equal division of all the matrimonial assets, which included the matrimonial home; other immoveable properties; monies in fixed deposit bank accounts, and the respondent's Employees Provident Fund ('EPF'); and the respondent's

A shares in several companies. In addition, whether the petitioner was entitled to the Porsche which belonged to the respondent.

B **[9]** The divorce was granted and the decree nisi was made absolute immediately. The respondent was ordered to pay spousal and child maintenance, and the matrimonial assets were divided accordingly between the petitioner and respondent. No damages were awarded to the petitioner from the co-respondent. The following are my reasons.

C CONTENTIONS, EVALUATION, AND FINDINGS

[10] In evaluating the claims made by the petitioner, the respondent at the outset, brought to the attention of this court a marital agreement ('the marital agreement') entered into between the parties. The marital agreement, according to the respondent, addressed the issue of adultery as well as provisions for spousal and child maintenance.

[11] As such, it became essential to first address and determine the legitimacy and validity of the marital agreement.

E *Whether the marital agreement was valid and binding*

[12] The marital agreement, dated 9 August 1997, contained the following terms:

F WHEREAS the First and Second Party had on 12/7/1997 registered their marriage at the Civil Registry, Petaling Jaya vide marriage certificate no 891505 (hereinafter called 'the Marriage').

WHEREAS the First Party was a single unmarried man prior to the Marriage whilst the Second Party was a widow with a son born out of the previous marriage.

G

AND WHEREAS both parties to this agreement have agreed to be bound by the terms and conditions hereafter appearing.

NOW THIS AGREEMENT WITNESSETH as follows:

H 1. In the event of a separation and/or divorce, the custody, care, and control of any child(ren) born out of the Marriage of both parties hereto shall be placed as follows:-

a) The first child of the Marriage shall be placed in the custody, care, and control of the First Party,

I b) Any subsequent children shall be divided between the parties hereto and

c) In the event the number of children under sub-clause (b) above is an odd number the last and youngest child shall be placed with the Second Party.

2. The child mentioned in the second recital shall at all times be the sole responsibility of the Second Party and shall not be taken into consideration when determining custody of the children mentioned in Clause 1 above.

3. If a divorce is sought by the First Party then the First Party shall pay to the Second Party as alimony of RM40,000 (Ringgit Forty Thousand) per year for each year the parties have been married (which shall be calculated from the date of registration to the date of separation) together with a further monthly sum of RM1,500 (Ringgit One Thousand Five Hundred) for each child of the Marriage in the custody of the Second Party being maintenance until the child(ren) attain the age of 18.

4. Should the Second Party seek a divorce then she will be liable to pay to the First Party an alimony of RM20,000 (Ringgit Twenty Thousand) per year for each year the parties have been married ((which shall be calculated from the date of registration to the date of separation) together with a further monthly sum of RM 750 (Ringgit Seven Hundred and Fifty) for each child of the Marriage in the custody of the Second Party being maintenance until the child(ren) attain the age of 18.

5. It is expressly agreed by the parties hereto that the alimony mentioned in Clauses 3 and 4 above shall be payable in one lump sum to the other party upon conclusion of divorce proceedings as full and final settlement and *in lieu* of any right towards division of matrimonial assets and maintenance.

6. It is hereby lastly agreed and expressly consented to by the Second Party that the First Party can at any time have ONE other woman partner in his life besides the Second Party and it shall not be treated as adultery or adulterous and used as a ground for divorce or in any manner whatsoever affect or prejudice the terms and conditions agreed upon hereinabove.

[13] Although the petitioner's counsel consistently described the marital agreement as a pre-nuptial arrangement, I regarded it as a post-nuptial agreement. By definition, a pre-nuptial agreement is established prior to the marriage and typically concerns the management of matrimonial assets. In contrast, a post-nuptial agreement is formulated by spouses during their marriage but before any separation, distinguishing them from a separation agreement, which is created after the marital relationship has deteriorated. Given that the marital agreement in question was executed after the marriage was registered, it was my view that the marital agreement should accurately be classified as a post-nuptial agreement.

[14] It was essential to acknowledge that marital agreements hold statutory recognition under the Law Reform (Marriage and Divorce) Act 1976 ('Law Reform (Marriage and Divorce) Act'), specifically in s 56, which states:

Section 56 — *Rules to provide for agreements to be referred to Court*

> Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, *to refer to the court any agreement or arrangement made or proposed to be made between them*, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, *and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions*, if any, in the matter as it thinks fit. (Emphasis added.)

[15] Marital agreements have also been referred to in several cases including *Lim Thian Kiat v Teresa Haesook Lim & Anor* [1998] 2 MLJ 102, where it was held by James Foong J (as he then was) that the court had sufficient authority to decide on the validity of a marital agreement.

[16] At this juncture, it was fundamental to emphasise that although it has been said that a marriage contract has to be differentiated from other commercial contracts, the fact of the matter is that marriage is a voluntary agreement between consenting adults. As long as there is no violation of any law, parties to a marriage, therefore, have the right to make decisions about their own relationships and lifestyle preferences according to their unique needs, desires, and circumstances. This includes deciding the terms and boundaries of their marriage. In my view, no external entity, including this court, should have the authority to dictate the dynamics of a married couple's life within their marriage.

[17] As was aptly put by Lord Phillips in the UK Supreme Court case of *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42:

> The reason why the court should give weight to a nuptial agreement is that *there should be respect for individual autonomy*. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. *It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.* This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future. (Emphasis added.)

[18] The English legal position towards acceptance of marital agreements has been permissive and receptive in certain circumstances. This could be seen in the earlier cases of *M v M (prenuptial agreement)* [2002] 1 FLR 654 and *K v K (ancillary relief: prenuptial agreement)* [2003] 1 FLR 120.

[19] I am mindful that these English cases may not be binding on Malaysian courts, but s 47 of the Law Reform (Marriage and Divorce) Act clearly states that this court may apply principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings. The provision reads:

Section 47 — *Principles of law to be applied*

Subject to the Provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, *conformable to the principles on which the High Court of Justice in England acts* and gives relief in matrimonial proceedings. (Emphasis added.)

[20] The petitioner contended that the marital agreement was not valid and should not be enforceable against the parties, as she claimed that it was executed under conditions of ignorance, pressure, and duress. She asserted that at the time of signing, she was pregnant with WYL and harboured fears that failing to sign the marital agreement would lead to refusal of marriage by the respondent. In fact, the petitioner, while under cross-examination went as far as saying that she would have aborted WYL whom she was carrying, if not for the fact that the pregnancy was already at an advanced stage.

[21] I found the petitioner's claim to be bereft of merit for several reasons. Firstly, the marital agreement was executed post-registration of the marriage, negating the premise of any form of pre-marital pressure. Given this timing, the petitioner, already legally wed, possessed the autonomy to refuse to sign the agreement, which consequently, undermined her claim of coercion. As elucidated in *MacLeod v MacLeod* [2008] UKPC 64, while voluntariness might be compromised in pre-nuptial agreements, where one party may leverage the agreement as a condition for marriage, such concerns are mitigated in post-nuptial agreements. This is because, by the time a post-nuptial agreement is made, the couple has already assumed marital responsibilities towards each other.

[22] Secondly, the petitioner's educational background further weakened her assertion of ignorance, duress, and involuntariness. As a graduate of the National University of Singapore, it strained credibility to suggest that she felt devoid of any choice but to consent to the marital agreement. The petitioner came across as a very shrewd and calculative woman, and I found it unbelievable that someone of her standing was forced to consent to the terms of the marital agreement without understanding the implications thereof.

[23] Moreover, the careful execution of the marital agreement, evidenced by the petitioner's initials on every page and the signatures of four witnesses, made it implausible to contend that she was pressured or coerced into signing it.

[24] Thirdly, the petitioner's acknowledgment of her pregnancy and the consequent inevitability of marriage lent credence to the respondent's assertion, who claimed that it was the petitioner who had sought the security of marriage, to ensure provision for both herself and SP3, her son from her

previous marriage. This context made her current claim of being pressured into signing the marital agreement, absolutely baseless.

[25] Furthermore, since the petitioner insisted that her consent to the marital agreement was not voluntary, the burden of proof lay on her to prove such fact, in accordance with s 103 of the Evidence Act 1950 ('the Evidence Act'). The provision reads:

> Section 103 — Burden of proof as to particular fact
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence*, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Emphasis added.)

[26] In my view, the petitioner had not sufficiently demonstrated that she did not sign the document voluntarily.

[27] While I took the position that the marital agreement was entered into by the petitioner voluntarily, it was imperative to recognise that voluntariness alone did not guarantee the validity of all its terms. The court possessed the discretion to assess the fairness, reasonableness, and legality of each term of the marital agreement. Therefore, it became incumbent upon the court to meticulously scrutinise each term to ensure its compliance with legal standards.

[28] In the present case, custody of the children was addressed in cll 1 and 2 of the marital agreement. I found these clauses irrelevant as custody of the children was not a matter in dispute as most of them were adults, although the respondent had sought access to WYL. It had already been agreed between the parties that WYL and SP4 would remain under the custody, care, and control of the petitioner. Nevertheless, even if custody was an issue, I found the terms concerning the same to be peculiar and unreasonable. The parties seem to have treated the children as mere possessions, dictating which child should reside with the petitioner and which with the respondent, without any other consideration.

[29] At this point, my approach was influenced by the case of *W v H* [1987] 2 MLJ 235, where Shankar J (as he was then known) provided insights regarding a separation agreement. Specifically, Shankar J's commentary focused on the provisions within the agreement concerning the custody and maintenance of the children involved:

> This jurisdiction has its source in the relationship between the Crown (acting through the courts) and its subjects, who owe allegiance to the Crown and to whom the Crown offers its protection, observing a special obligation as *parens patriae* to minors. *All Malaysian minors are wards of court because they are subject to the parental jurisdiction entrusted to the courts.*

...

These provisions make it crystal clear that *parents cannot oust the protective jurisdiction of the Court over their children in matters of custody and maintenance*. (Emphasis added.)

[30] Custody matters necessitate the court's consideration of the child's welfare, requiring a comprehensive approach. This entails assessing each parent's suitability, their capability to provide a nurturing environment for the child, and even taking into account the child's own wishes. Clauses 1 and 2 of the marital agreement, therefore, could not be upheld.

[31] Clauses 3, 4, and 5 of the marital agreement dealt with spousal and child maintenance. Upon examination, I found these clauses to be egregiously unreasonable, unfair, and fundamentally inequitable. As alluded to earlier, the parties are not allowed to oust the protective jurisdiction of the court over their children in matters of custody and maintenance. Hence the terms of the marital agreement referring to child maintenance could not be upheld.

[32] A careful interpretation of cll 3 and 4 of the marital agreement also revealed a situation wherein the party initiating the divorce would be compelled to provide maintenance to the other party. Should these clauses be enforced, the petitioner would be obligated to pay the respondent a staggering sum of MYR480,000 simply because she was the one who initiated divorce proceedings. Such provisions not only lacked reasonableness, they also contravened legal principles, as they assumed a punitive nature, effectively coercing the parties to remain in an undesirable marriage solely to avoid financial penalties.

[33] It was imperative to underscore that the Law Reform (Marriage and Divorce) Act permits parties to a marriage to pursue divorce on specific statutory grounds, with maintenance considerations predicated upon both the means and needs of the parties involved, as well as the underlying causes of the breakdown of the marriage. No spouse should be compelled to make financial payments solely based on initiating divorce proceedings. Consequently, these clauses stood in clear contradiction to the overarching framework established by the Law Reform (Marriage and Divorce) Act. Reference was also made to s 24(b) of the Contracts Act 1950 ('Contracts Act'), which renders unlawful the consideration or object of an agreement if it would defeat any law, and in this case, cll 3, 4, and 5 of the marital agreement would undeniably be defeating the law. Section 24(b) of the Contracts Act reads:

Section 24 — *What considerations and objects are lawful and what not*

The consideration or object of an agreement is lawful, unless —

(b) it is of such a nature that, if permitted, *it would defeat any law;*

... (Emphasis added.)

[34] Clause 6 of the marital agreement essentially permitted the respondent to maintain at least one mistress during the course of the marriage. The petitioner contended, invoking s 24 of the Contracts Act, that any form of agreement sanctioning adultery within the institution of marriage was both illegal and immoral. Section 24(a) and (e) of the Contracts Act reads:

> Section 24 — What considerations and objects are lawful and what not The consideration or object of an agreement is lawful, unless —
>
> (a) *it is forbidden by a law;*
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) *the court regards it as immoral,* or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (Emphasis added.)

[35] Counsel for the petitioner, in an 11th-hour manoeuvre and precisely on the day scheduled for decision of this trial to be delivered, introduced several cases in an attempt to bolster her argument that cl 6 of the marital agreement should not be considered by this court. This last-ditch submission sparked a vehement objection from the respondent, who took umbrage to the timing and nature of such submission.

[36] At this juncture, it became necessary for me to address the pattern of delay exhibited by the petitioner's counsel throughout these proceedings. Her approach had been consistently procrastinatory; she filed her witness statements way past the deadline, causing an unnecessary delay to the trial. During the trial, she made attempts to introduce a bundle documents which had not been filed at all, to which the respondent's counsel had rightfully objected. I also took a dim view of the suggestion made by the petitioner's counsel that it was the court staff who had misplaced the bundle of documents.

[37] To compound her procrastinatory conduct, mere moments before the delivery of this trial's decision, she sought to present new legal authorities, including a precedent from India, namely, *AE Thirumal Naidu v Rajammal* AIR 1968 Mad 201, to bolster her argument that adultery constitutes a criminal act.

[38] My view of the petitioner's counsel's conduct was decidedly critical, given the considerable inconvenience and disruption caused not only to the respondent's legal team but to the operations of this court as well.

[39] Nevertheless, despite considering the 11th-hour submission of authorities by the petitioner's counsel, I found myself compelled to reject her argument for several reasons. Foremost among these is the fact that the court is not condoning any criminal offence. Adultery, in and of itself, does not constitute an illegal or criminal act among non-Muslims. It was essential to note that the Indian cases cited by the petitioner referred to s 497 of the Indian Penal Code, which reads:

> Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

[40] It was crucial to recognise that while s 497 of the Indian Penal Code does, in fact, criminalises adultery, a landmark decision by the Supreme Court of India profoundly altered its standing. In *Joseph Shine v Union of India* (2019) 3 SCC 39; AIR 2018 SC 4898, the court declared s 497 to be arbitrary and unconstitutional. This pivotal ruling highlighted the section's discrimination as it solely penalised men, thereby exempting women from punishment for adultery. This judgment underscored a significant shift in the legal landscape regarding adultery laws in India.

[41] The Indian case of *AE Thirumal Naidu v Rajammal*, submitted by the petitioner's counsel was decided in 1967. The case was not only outdated, its relevance was confined to the context of Hindu law, determining that an agreement between a husband and wife to live separately contravened the principles of Hindu jurisprudence. This decision, therefore, had no bearing on the present case.

[42] Last but not least, a critical aspect to consider is the notable absence of an equivalent to s 497 of the Indian Penal Code within the Malaysian Penal Code. Upon thorough examination, it was apparent that the Malaysian Penal Code distinctly mentions that 'There is no s 497'. This explicit acknowledgment within the legislation clarified that, within the Malaysian context, adultery does not constitute a criminal offence among non-Muslim citizens.

[43] The petitioner's argument extended to assert that cl 6 was inherently immoral and contravened public policy, essentially because it seemed to permit a spouse's acceptance of adultery, thereby challenging the clause's validity in the eyes of the court.

[44] To navigate this argument, it was essential to delve into the understanding of public policy, a concept eloquently encapsulated by Burrough J in *Richardson v Mellish* [1824–34] All ER Rep 258, where he likened it to a 'very unruly horse,' unpredictable in the direction it may take once one embarks upon it.

[45] I also found guidance in *M v M (prenuptial agreement)* [2002] 1 FLR 654, where it was held by Connell J that '… the Court should look at any such agreement and decide in the particular circumstances what weight should, in justice, be attached to it …The public policy objection to such agreements, namely that they tend to diminish the importance of the marriage contract, seem to me to be of less importance now that divorce is so commonplace'.

[46] In my analysis, claiming that cl 6 was against public policy was an untenable position. Clause 6, by its nature, embodied the petitioner's acquiescence to adultery committed by the respondent. This situation was expressly considered under s 54(1)(a) of the Law Reform (Marriage and Divorce) Act, which delineates that the irretrievable breakdown of a marriage is not solely contingent upon the establishment of adultery but hinges crucially on whether such adultery has made it intolerable for the petitioner to cohabit with the respondent. This nuanced perspective underscored the law's recognition that the essence of marital breakdown lies not just in the act of adultery itself but in its impact on the marital relationship's sustainability.

[47] Section 54(1)(a) of the Law Reform (Marriage and Divorce) Act intricately balances personal freedoms with the sanctity of marriage, highlighting that the legal framework is designed to navigate complex personal dynamics sensitively and pragmatically, rather than outright criminalising or moralising the behaviours involved. The provision is reiterated:

> Section 54 — *Proof of breakdown*
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —
>
> (a) that the respondent has committed adultery *and the petitioner finds it intolerable to live with the respondent;* … (Emphasis added.)

[48] In the present case, the petitioner had voluntarily signed a marital agreement wherein she explicitly accorded permission for the respondent to

maintain a relationship with one mistress at any given time. This arrangement evidently signalled the petitioner's prior tolerance and acceptance of the respondent's extramarital activities, assuming they occurred within the agreed parameters.

[49] It must also be noted that the petitioner had failed to adduce any evidence indicating a withdrawal of her consent regarding the respondent's engagement with at least one mistress at any given time. This absence of evidence by the petitioner had contributed to the perception held by the respondent that the petitioner was accepting of his extramarital relationships.

[50] Consequently, it appeared fundamentally unjust for the petitioner to now allege that such acts of adultery had singularly precipitated the irretrievable breakdown of their marriage. This stance was particularly contentious when considering her pursuit of damages from the co-respondent under s 58 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 58 — *Damages for adultery may be claimed against co-respondent*
>
> (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.
>
> (2) *A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.*
>
> (3) Where damages have been claimed against a co-respondent —
>
> (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or
>
> (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element. (Emphasis added.)

[51] Given that the petitioner had consented to the provision in cl 6 of the marital agreement, her assertion that the alleged adultery between the respondent and co-respondent had caused the irretrievable breakdown of the marriage, was untenable.

[52] Even if I disregarded cl 6 of the marital agreement, the fact remained that the petitioner had not successfully demonstrated that adultery had even occurred between the respondent and co-respondent, as indicated in my views below.

MAINTENANCE

[53] In delving into the intricacies of the maintenance issue, particular attention was directed to s 77(1) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 77 — Power of court to order maintenance of spouse
>
> (1) The court may order a man to pay maintenance to his wife or former wife:
>
> (a) during the course of any matrimonial proceedings;
>
> (b) *when granting* or subsequent to the grant of *a decree of divorce* or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive. (Emphasis added.)

[54] Despite the discretionary power held by the court in handling maintenance claims by a wife, the court was guided by the degree of responsibility assigned to each party for the breakdown, and the 'means and needs' test, outlined by s 78 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 78 — Assessment of maintenance
>
> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on *the means and needs of the parties*, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, *but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.* (Emphasis added.)

[55] In my assessment of whether the petitioner was deserving of maintenance, I found guidance in established legal precedents, specifically the cases of *Shameni Pillai a/p PB Rajedran v S Arulselvam a/l Sanggilly and Rafidah bt Mat Taib (responden bersama)* [2010] MLJU 1333; [2011] 6 CLJ 782, and *V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474. These cases underscored the importance of considering the following factors:

(a) the income, earning capacity, property, or financial resources that each party presently possesses or is likely to possess in the foreseeable future;

(b) the financial needs, obligations, and responsibilities that each party currently or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family prior to the breakdown of the marriage;

(d) the age of each party and the duration of their marriage;

(e) any existing health, physical, or mental disability of the parties;

(f) the respective contributions made by each party to the welfare of the family; and

(g) the duration of the marriage.

Whether breakdown of marriage due to adultery which petitioner found intolerable

[56] The petitioner undoubtedly bore the legal burden of proving adultery, as mandated by s 103 of the Evidence Act. This burden arose from her intention to convince the court of the factual existence of an adulterous act between the respondent and co-respondent. Hence, the issue that necessitated evaluation was the standard of proof required to substantiate a claim of adultery.

[57] The respondent argued that the petitioner was required to prove adultery beyond a reasonable doubt. According to this stringent criterion, it was asserted by the respondent that the petitioner had not successfully demonstrated the occurrence of adultery involving the respondent and co-respondent.

[58] Contrary to the respondent's contention, I concluded that the standard of proving adultery should be on the balance of probabilities, for several compelling reasons. Primarily, the standard of proof beyond a reasonable doubt is traditionally reserved for criminal offences. It was pertinent to highlight that, as previously mentioned, within the context of non-Muslim demographics in Malaysia, the act of adultery does not constitute a criminal offence.

[59] Nevertheless, adultery was treated as a matrimonial offence, and courts had frequently demanded proof beyond a reasonable doubt for a divorce decree based on such ground. However, the introduction of the Law Reform (Marriage and Divorce) Act, which took effect from 1 March 1982, shifted the focus towards recognising the irretrievable breakdown of marriage as the primary basis for divorce, moving away from the antiquated notion of attributing fault through the commission of matrimonial offences.

[60] Furthermore, it was imperative to remember that this is a civil court dealing with civil matters, and like in any serious allegations, such as fraud or forgery, there should be a consistent standard of proof, which is on the balance of probabilities. This perspective was supported in the case of *GGC v CCC & Anor* [2016] MLJU 377; [2016] 1 LNS 885. The judgment drew upon the principles established in the Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584. In this regard, Lee Swee Seng J (as he then was), in the following passage, elucidated that even in instances involving grave allegations, the standard of proof in civil cases remains uniformly on the balance of probabilities:

> [99] Based on the cogent arguments of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, which has held that fraud in civil cases should be proved on the standard of proof of the balance of probabilities, the time has come for standardisation of proof even in cases of adultery in a divorce petition which is essentially fraud on a spouse in a civil proceeding: it should be henceforth on a balance of probabilities as well. The anomaly has to be realigned. To perpetuate the dichotomy would be to create an artificial distinction devoid of merits. The Federal Court could not have made it clearer when in declaring the standard of proof on a balance of probabilities in civil fraud as follows:
>
> > [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (children). It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases.* As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'. (Emphasis added.)

[61] However, it was crucial to acknowledge that the balance of probabilities standard encompasses a spectrum, ranging from merely tipping the scales at more probable than not (or at 51 percent as delineated in *Unsung bin Rasad v Public Prosecutor* [2019] 4 MLJ 448; [2019] 1 LNS 662) to a higher degree of probability, albeit one that falls short of reaching proof beyond a reasonable doubt.

[62] In the present case, the gravity of the allegation of adultery could not be understated. Consequently, while the standard of proof remained on a balance of probabilities, it necessitated a consideration of a heightened degree of such standard given the seriousness of the accusation.

[63] I found guidance in the precedent set forth in the case of *Bater v Bater* [1950] 2 All ER 458, where Lord Denning elucidated the correlation between the gravity of allegations in a civil case and the varying degrees of the balance of probabilities standard of proof:

> ... So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, *will naturally require a high degree of probability than that which it would require if considering whether negligence was established.* (Emphasis added.)

[64] The Court of Appeal in *Teoh Meng Kee v Public Prosecutor* [2014] 5 MLJ 741; [2014] 7 CLJ 1034 provided pertinent insight into the differing degrees of the balance of probabilities standard. In that case, the application of the civil standard of proof led to a reference to the *Briginshaw* sliding scale established in *Briginshaw v Briginshaw* (1938) 60 CLR 336. This legal principle asserted that while rooted in the civil standard of balance of probabilities, the level of persuasion required to convince the court varies depending on the seriousness or gravity of the allegation. Consequently, although the balance of probabilities standard remains the benchmark, the sliding scale tilts towards a more rigorous weight and assessment of the evidence.

[65] In addition, guidance was gleaned from the Federal Court case of *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469. Here, reference was made to the explanation by Lord Nicholls of Birkenhead in *Re H and others (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1, wherein it was underscored that the standard of proof on a balance of probabilities is a flexible test, and that ultimately the court must be sufficiently satisfied:

> ... on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, *that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence* before the court concludes that the allegation is established on the balance of probability. (Emphasis added.)

[66] Hence the standard of proving adultery is on a balance of probabilities but a higher degree of such standard.

[67] In her endeavour to substantiate the allegation of adultery, the petitioner adduced several pieces of evidence, namely screenshots of video calls and *WhatsApp* messages (collectively 'the screenshots'). The screenshots of the video calls, allegedly captured an exchange of graphically sexual pictures between the respondent and the co-respondent, whilst the screenshots of *WhatsApp* messages, were exchanges purportedly between the respondent and the co-respondent, characterised by their indecent content. In addition, a video recording was introduced, purportedly depicting the respondent and co-respondent *in flagrante delicto*.

[68] The respondent had objected to the screenshots, contending that they failed to meet the established rules of evidence required for their admissibility.

[69] I was unable to accept the screenshots for the following reasons. First and foremost, the evidence consisted of mere screenshots taken by the petitioner of the video calls, and *WhatsApp* messages found on the respondent's cell phone. However, no evidence whatsoever was led to indicate what type of device the petitioner had used to take such screenshots, as such device was never adduced. Furthermore, I harboured reservations about whether the petitioner was indeed the individual who took such screenshots.

[70] Given that these were mere screenshots of the video calls and *WhatsApp* messages, they constituted secondary evidence. Such categorisation was in accordance with illustration (a) of s 63 of the Evidence Act, which reads:

> Section 63 — Secondary evidence
>
> ...
>
> Illustrations
>
> (a) *A photograph of an original is secondary evidence of its contents*, though the two have not been compared, if it is proved that the thing photographed was the original. (Emphasis added.)

[71] Given that both the respondent and co-respondent contested the authenticity of the messages, asserting that the petitioner might have fabricated them, the originality of the screenshots was not sufficiently established as mandated by the relevant legal standards.

[72] Even if I were inclined to admit the screenshots, such acceptance would be contingent upon the petitioner's ability to fulfill any of the criteria for adducing secondary evidence as outlined in s 65 of the Evidence Act. This section specifies the conditions under which secondary evidence may be permitted, underscoring the necessity for the petitioner to demonstrate a valid reason within these stipulations for the evidence to be considered. Section 65 of the Evidence Act reads:

> Section 65 — Cases in which secondary evidence relating to documents may be given
>
> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) when the original is shown or appears to be in the possession or power —
>
> (i) of the person against whom the document is sought to be proved;
>
> (ii) of any person out of reach of or not subject to the process of the court; or

(iii) any person legally bound to produce it,
and when after the notice mentioned in section 66 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

...

[73] The absence of a justification for not producing the original device used by the petitioner to capture the screenshots had critically undermined the admissibility of such evidence.

[74] In furtherance of their argument, counsel for the respondent and co-respondent advanced the position that the court ought to dismiss the screenshots on the ground of non-compliance with s 90A(2) of the Evidence Act. This particular section outlines specific criteria for the admissibility of electronic records, emphasising the necessity for such evidence to meet rigorous standards of verification and reliability. The provision reads:

Section 90A — Admissibility of documents produced by computers, and of statements contained therein

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by *tendering to the court a certificate signed by a person* who either before or after the production of the document by the computer is *responsible for the management of the operation of that computer*, or for the conduct of the activities for which that computer was used. (Emphasis added.)

[75] In my view, the matter concerning the certification as mandated by s 90A(2) of the Evidence Act did not necessitate consideration, primarily because the original device, which the petitioner used to capture the screenshots, was never submitted for evaluation in the first place. Consequently, the opportunity to accompany such a device with a requisite certificate of authenticity was foregone. Furthermore, the absence of expert testimony left the court unconvinced about the authenticity of the screenshots purportedly taken by the petitioner, rendering the evidence as presented insufficiently credible.

[76] The petitioner, in her efforts to argue for the admissibility of the screenshots, invoked s 114A of the Evidence Act. This was in anticipation that the court might presume the respondent and co-respondent to be the authors of the messages, given that their names and photographs were associated with these communications.

[77] Section 114A of the Evidence Act provides a framework under which certain presumptions may be made regarding the publication of content, contingent upon the presentation of specific types of evidence. However, this reliance on s 114A of the Evidence Act to bridge the evidentiary gap faced challenges due to the foundational issues with the admissibility and authenticity of such evidence. Section 114A reads:

> Section 114A — Presumption of fact in publication
>
> (1) A person *whose name, photograph* or pseudonym *appears on any publication* depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication *is presumed to have published or re-published the contents* of the publication unless the contrary is proved.
>
> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
>
> (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.
>
> (4) For the purpose of this section —
>
> (a) 'network service' and 'network service provider' have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588]; and
>
> (b) 'publication' means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer. (Emphasis added.)

[78] The petitioner sought to bolster her argument by referencing the cases of *YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad* [2015] 3 MLJ 364; [2015] 2 MLRA 492 and *Tong Seak Kan & Anor v Loke Ah Kin & Anor* [2014] 5 MLRH 710, to contend that s 114A of the Evidence Act should be applicable in the present context.

[79] However, I found the application of s 114A of the Evidence Act to the current case unpersuasive for several reasons. Firstly, the screenshots were categorised as Part C documents and remained as ID since the respondent had challenged their authenticity before the hearing had commenced. This placed the onus on the petitioner to substantiate both the authenticity and the contents of these documents.

[80] Regarding the cited cases, in *Tong Seak Kan & Anor v Loke Ah Kin & Anor* [2014] 5 MLRH 710, the connection of two IP addresses to the first defendant was affirmed via affidavit by Telekom Malaysia and TM Net, effectively shifting the burden of proof to the first defendant; whilst in *YB Dato' Hj Husam bin Hj Musa v Mohd Faisal bin Rohban Ahmad* [2015] 3 MLJ 364; [2015] 2 MLRA 492, documents suggesting the defendant's ownership of a blogsite were already accepted as exhibits within the proceedings.

[81] In contrast, the current case lacked verification of the origin of the subject matter of the screenshots, namely the video calls and *WhatsApp* messages, with the respondent denying ownership or recognition of the phone or messages from which the screenshots were supposedly taken. Moreover, discrepancies such as a misspelled name purportedly belonging to the co-respondent on the contact page and the absence of timestamps on the *WhatsApp* messages further compromised the reliability of the screenshots.

[82] Given these factors, reliance on s 114A of the Evidence Act was deemed inapplicable and inappropriate. Consequently, at this juncture, it would be imprudent to regard the screenshots as definitive evidence of the alleged communication between the respondent and co-respondent. The authenticity of these documents remained unverified, compounded by the respondent and co-respondent's assertion that without access to the original devices, the video calls or *Whatsapp* messages could potentially be fabricated. Establishing the true identity of the sender and receiver, in this case, necessitated further evidence, rendering the screenshots insufficient as proof of the alleged conversations.

[83] Even if, for the sake of argument, I concurred with the petitioner's assertion that the video calls and *WhatsApp* exchanges had indeed occurred between the respondent and co-respondent, the evidence adduced primarily consisted of images depicting the co-respondent in various stages of undress,

coupled with explicit messages and sexually graphic pictures shared between the respondent and co-respondent. Notably, these materials did not explicitly document or reference any acts of sexual intercourse occurring between the respondent and co-respondent.

[84] At this point, it was imperative to remember the legal standard for proving adultery, which necessitates a demonstration beyond mere insinuation or speculation. As delineated in the case of *Clarkson v Clarkson* (1930) 143 LT 775; (1930) 46 TLR 623, adultery is explicitly defined as voluntary sexual intercourse between a man and a woman who are not married to each other, with at least one party being married to someone else. This definition underscores the necessity for concrete evidence of a physical relationship to substantiate claims of adultery, beyond mere suggestive texts or compromising photographs. I also found guidance in several cases from India, namely, *Gitabai v Fattoo And Anr* AIR 1966 Madhya Pradesh 130, and *D Henderson v D Henderson* AIR 1970 MAD 104, where it was stated that adultery is consensual sexual intercourse between a married person and a person of the opposite sex who is not a spouse of the other during the subsistence of the marriage.

[85] Hence, the evidence must go beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things, adultery must have been committed. Where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation.

[86] At this stage it was first crucial to distinguish between infidelity and adultery, terms that are often used interchangeably, but are in actual fact, different. Infidelity generally refers to any breach of trust or violation of the agreed-upon terms of a relationship or marriage. It can encompass a wide range of behaviours, including emotional affairs, physical affairs, flirting, sexting, or any other form of intimate interaction outside the established relationship. Adultery, as alluded to earlier, refers to the act of engaging in sexual intercourse with someone other than one's spouse while being married. It is a type of infidelity that involves physical betrayal within the bounds of marriage. This means that whilst adultery is a form of infidelity, not all forms of infidelity necessarily constitute adultery, in the context of s 54(1)(a) of the Law Reform (Marriage and Divorce) Act.

[87] The infidelity, if at all, between the respondent and co-respondent, was cyber-based. Cyber infidelity, also known as online infidelity or digital infidelity, entails the violation of trust within a committed relationship through engaging in romantic or sexual interactions with someone outside the partnership via digital or online platforms. This breach of fidelity involves

leveraging technology, such as social media, messaging applications, or online forums, to foster connections that transgress the boundaries of a monogamous relationship.

[88] In the current case, while the exchanged messages purportedly between the respondent and the co-respondent were indeed explicit and sexually charged, they lacked any direct indication of actual sexual intercourse. Rather, the contents of the video calls and *WhatsApp* exchanges hinted at a form of conduct best characterised as cyber infidelity, where the respondent engaged in intimate digital exchanges with the co-respondent.

[89] Hence, even if I were to entertain the petitioner's assertion regarding the authenticity of the video calls and *WhatsApp* messages depicting the online interactions between the respondent and the co-respondent, such behaviour fell short of constituting adultery as stipulated in s 54(1)(a) of the Law Reform (Marriage and Divorce) Act.

[90] The petitioner had also adduced three video recordings purporting to depict the respondent and co-respondent engaged in sexual intercourse. Objections, however, were raised by both respondent and co-respondent regarding the admissibility of these recordings.

[91] In my view, the video recordings were inadmissible for several reasons. Foremost among these was the failure of the petitioner to produce the original recording in court. Instead, what was submitted and played in court was a copy of the recording stored on a compact disc (CD). This non-compliance with the best evidence rule, as outlined in s 64 of the Evidence Act, undermined the reliability and authenticity of the evidence adduced. Section 64 of the Evidence Act reads:

> Section 64 — Proof of documents by primary evidence
>
> Documents must be proved *by primary evidence* except in the cases hereinafter mentioned. (Emphasis added.)

[92] Given that the recording on the CD constituted secondary evidence, the pertinent question before the court revolved around whether the petitioner had furnished any justifications as outlined in s 65 of the Evidence Act to validate the admissibility of such secondary evidence. This provision delineates the circumstances under which secondary evidence may be admitted, necessitating a thorough examination of the petitioner's rationale for its submission. Section 65 of the Evidence Act is reiterated below:

> Section 65 — Cases in which secondary evidence relating to documents may be given

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original is shown or appears to be in the possession or power-

(i) of the person against whom the document is sought to be proved;

(ii) of any person out of reach of or not subject to the process of the court; or

(iii) any person legally bound to produce it,

and when after the notice mentioned in section 66 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

[93] When questioned regarding the whereabouts of the concealed camera utilised by the petitioner to purportedly capture the act of sexual intercourse, she asserted that she had borrowed it from a friend and no longer possessed it. Although the petitioner claimed responsibility for setting up the hidden camera in the room, she had failed to provide adequate justification for failing to produce the original device, that is, the concealed camera itself. Consequently, the mere existence of a recording without authenticating the physical device rendered the recording inadmissible.

[94] It was imperative to underscore that producing the actual concealed camera was essential for subjecting it to the established common law rules governing admissibility. This served to ensure the integrity and reliability of evidence adduced in court. The following common law rules are now part of Malaysian jurisprudence *via* cases such as *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210; [1998] 4 CLJ SUPP 208, *Public Prosecutor v Balveer Singh a/l Mahindar Singh* [2009] 1 MLJ 386; [2008] 1 LNS 498, *Sahari bin Masrom v Public Prosecutor* [2009] 2 MLJ 859; [2008] 1 LNS 584,

and *Jambri bin Abd Hamid v Public Prosecutor* [2009] 9 MLJ 683; [2009] 1 LNS 190:

(a) that the tape was run through and found to be clean before the recording was made;

(b) that the machine was in proper working order;

(c) that the tape was not tampered with or altered in any way and it should be established in whose possession the tape was at all times;

(d) that the witnesses played the tape over after making the recording and heard voices which they can identify;

(e) that a transcript was prepared of the voices; and

(f) that the witnesses played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation:

[95] While the common law principles articulated in the above-mentioned cases primarily addressed tape recordings, it was incumbent upon courts to exercise vigilance and scrutinise the authenticity of all types of recordings. It was also crucial to recognise that while technology has ushered in remarkable advancements across various fields, it also presents a dual nature, offering means for both legitimate use and manipulation of evidence.

[96] Given the petitioner's failure to produce the concealed camera, this court was unable to verify whether the recording downloaded onto the CD indeed corresponded to the original footage captured by the petitioner.

[97] Despite the petitioner's assertion that she had personally witnessed the respondent and co-respondent parking their cars at the premises where the alleged act of sexual intercourse occurred, she lacked tangible evidence to support this claim. Her testimony alone, in my assessment, fell short of convincing this court of its veracity.

[98] Even if reliance was placed on the recording adduced, I found it impossible to definitively conclude that it depicted the alleged sexual encounter between the respondent and co-respondent. The footage was marred by blurriness and graininess, making it difficult to discern more than the silhouette of a man's head and what appeared to be a woman's legs. The individuals in the recording remained unidentified, and there was insufficient evidence to establish their identities as the respondent and co-respondent.

[99] Considering the stringent standard of proof required to establish adultery, such a recording failed to meet the necessary threshold.

[100] In summary, I concluded that adultery did not serve as the cause for the irretrievable breakdown of the marriage. This conclusion stemmed from the lack of evidence of adultery, and even if it were established, it was my view that the petitioner had not found it intolerable, as stipulated in cl 6 of the marital agreement.

[101] It was also crucial to remind parties that even if adultery was established, the automatic granting of damages was not guaranteed. The court retained discretion in deciding whether damages should be awarded, as indicated by the word 'may' in s 58(3) of the Law Reform (Marriage and Divorce) Act, which stipulates:

> Section 58 — Damages for adultery may be claimed against co-respondent
>
> ...
>
> (3) Where damages have been claimed against a co-respondent —
>
> (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or
>
> (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, *the court may award the petitioner such damages* as it may think fit, but so that the award shall not include any exemplary or punitive element. (Emphasis added.)

Whether breakdown of marriage due to abuse/ sexual abuse by the respondent

[102] The petitioner further contended that the marriage had irretrievably broken down due to the abusive treatment that she and the children endured at the hands of the respondent throughout the years. In support of this claim, she invoked s 54(1)(b) of the Law Reform (Marriage and Divorce) Act, which states:

> Section 54 — Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —
>
> ...
>
> (b) that the respondent has *behaved in such a way* that the petitioner *cannot reasonably be expected to live with the respondent*. (Emphasis added.)

[103] In her assertion that she could not reasonably be expected to live with the respondent, the petitioner alleged a history of abuse, physical assault, and verbal insults inflicted upon her, which instilled fear and prevented her from confronting the respondent. However, I found such claims unacceptable in the

absence of concrete evidence. The lack of any substantiated allegations raised serious doubts. If the petitioner had indeed endured abuse and physical harm, it raised questions as to why she had never lodged any police report documenting such incidents, with the exception of one lodged in December 2021, which the petitioner did, subsequent to the filing of the divorce petition. Given this dearth of evidence, there was insufficient basis to conclude that the respondent engaged in abusive behavior toward the petitioner.

[104] Furthermore, in her effort to illustrate the respondent's treatment of the children, the petitioner adduced a recording purportedly capturing the respondent instructing one of the children, namely, SP5, to download pornography from the internet. While the authenticity of this recording was not disputed, upon review, it became apparent that it was SP5, and not the respondent, who was engaged in the downloading activity. This discrepancy raised questions about the petitioner's motives for recording the incident rather than intervening to prevent SP5's access to inappropriate content. The undeniable inference drawn from this incident suggested that the petitioner had manipulated SP5's actions to incriminate the respondent and exploit the recording as leverage in the divorce proceedings. Given the petitioner's demonstrated behaviour, her allegation regarding the respondent's purported addiction to pornography, was in my view, implausible.

[105] The petitioner had also adduced an audio recording featuring one of the children, specifically SP5, requesting MYR50 from the respondent. This incident occurred during the peak of the pandemic when the country was under Movement Control Order. The audio recording depicted SP5 persistently pressuring the respondent for the money, while the respondent, clearly stressed from work, reacted by instructing SP5 not to disturb him.

[106] Upon careful consideration, I found this recording to be insufficient evidence of abuse of the children. It appeared to be a single incident taken out of context, showcasing the respondent's momentary frustration rather than a pattern of abuse. Additionally, it raised questions about SP5's approach to obtaining money, as he could have sought assistance from the petitioner if he was truly in need.

[107] It was evident that the petitioner's actions constituted yet another endeavour to gather evidence, with the intention of leveraging it against the respondent during the divorce proceedings.

[108] In addition, the petitioner alleged that the children had been subjected to physical abuse, starting as early as when they were two or three years old, and that the respondent had hindered their education, particularly WYL and other

A children who expressed a desire to study abroad. In support of her claims of physical abuse of the children, the petitioner provided photographs showing red marks on the children's bodies.

B **[109]** I found the petitioner's assertions to be untenable for several reasons. Firstly, there was a lack of evidence regarding the origin of these marks on the children's bodies. Secondly, even if the marks were indicative of bruising, there was no concrete evidence implicating anyone as the perpetrator. Thirdly, there was a notable absence of information regarding the timing of these alleged abusive incidents. Lastly, the absence of any police reports lodged at that time,
C regarding these incidents, raised doubts about the veracity of the claims.

[110] Moreover, the testimony of the children themselves was unreliable. While they claimed to recall instances of physical abuse, including being confined to a dog kennel for extended periods, they stated that these incidents
D occurred more than 20 years ago when they were around two or three years old. I found the testimonies provided by the children to be dubious and lacking credibility. It strained credulity to believe that they could recall such minute details of incidents from their toddler years.

E

[111] The petitioner then proceeded to level sexual allegations against the respondent, accusing him of molesting their two daughters, namely SP1 and SP2. Both SP1 and SP2 testified that the respondent had molested them for an extended period.

F

[112] In my view, it was undeniable that SP1 and SP2 had testified at the insistence of the petitioner to bolster her case. This inference was fortified by the timing of the sexual molestation allegations, which conveniently surfaced in 2021, following the filing of the Divorce Petition. Notably, a police report
G regarding the alleged incident was lodged only in December 2021.

[113] The evidence adduced by the petitioner rested solely on a video recording made by SP2 in April 2018 of the purported molesting of SP1 by the respondent. This video recording which was played in open court, depicted the
H respondent standing in close proximity to SP1, with a barely audible statement resembling 'Don't do this again' directed towards SP1. However, the respondent offered an explanation, stating that he was merely inspecting SP1's skin due to her severe eczema.

I **[114]** In my view, the video recording lacked the depth and clarity required to definitively establish the occurrence of sexual molestation. It provided no discernible evidence of sexual abuse on its own. Moreover, it raised the pertinent question of why SP2 felt compelled to make such a recording in the first instance.

[115] At this juncture, I must address the demeanour exhibited by SP2 during her testimony regarding the alleged sexual molestation of SP1. Throughout her narration in court, SP2 displayed a tendency to giggle incessantly, despite recounting the serious matter of SP1's purported sexual molestation, which she claimed to have witnessed and recorded. When questioned about her decision to record the incident, her response was that it was intended to show SP1 that it was now 'her turn to be molested' by the respondent.

[116] I found the entire narrative, provided by both SP1 and SP2, bizarre, perplexing, and highly improbable, to say the least. The demeanour displayed by SP2, coupled with the unusual rationale behind her decision to video record the incident, cast significant doubt on the credibility of testimonies of both SP1 and SP2.

[117] To exacerbate doubts I had already harboured, it came to light that it was only in December 2021 that the petitioner had lodged a police report against the respondent, levying numerous allegations, including the purported abuse of the children and the sexual abuse of the daughters, SP1 and SP2. Coincidentally, on the same day, the children also lodged similar police reports against the respondent.

[118] Despite the lodging of several reports against the respondent, there was no discernible action taken by the police. Subsequently, feeling unheard, the children decided to bring their allegations to public attention. In December 2022, a press conference was convened where both SP1 and SP2 publicly accused the respondent of sexually molesting them and of abusing all the children since their youth. Notably, the petitioner was present at the press conference. The following day, the press conference was extensively covered in local Chinese-language newspapers such as *China Press*, *Sin Chew Jit Poh*, and *Nanyang Siang Pau*.

[119] During the hearing of the divorce proceedings, the Court was apprised that the respondent had been charged in court on 16 December 2022 under ss 14(a) and 16(1) of the Sexual Offences Against Children Act 2017, and that the trial is currently ongoing.

[120] One crucial issue the court had to address regarding the police report was the timing of its lodging. The petitioner asserted that the physical abuse had commenced when the children were as young as two or three years old, and that the petitioner had been aware of the sexual abuse since 2018. However, the petitioner claimed that she had lodged the police report only in December 2021, due to her fear of the respondent.

[121] It was crucial to underscore that at the time of filing the divorce petition in January 2021, the petitioner had not referred to any allegation of abuse. However, a significant shift occurred in August 2022 when the petitioner changed solicitors to the current ones. Subsequently, in November 2022, the petitioner sought to amend her divorce petition to include allegations of abuse. This timeline suggested that the alleged abuse was not at all the cause of the irretrievable breakdown of the marriage. Rather, it appeared that these amendments were a strategic addition aimed at strengthening the petitioner's case, indicating a narrative devised after the fact.

[122] I had also noted that the petitioner's testimony was marred by significant inconsistencies, notably her statements regarding her knowledge of the alleged sexual molestation. In her police report, the petitioner indicated awareness of the sexual molestation since 2018. However, during cross-examination, she contradicted this claim by stating she had no prior knowledge of any alleged sexual molestation. This discrepancy was not merely a minor oversight; it had cast a profound shadow of doubt over the credibility of the entire narrative of sexual abuse purported by the petitioner and the children.

[123] In any event, the police reports lodged by the petitioner and the children held no weight as they were self-serving statements. Any police report lodged to corroborate an incident is made pursuant to s 157 of the Evidence Act, which reads:

> Section 157 — Former statements of witness may be proved to corroborate later testimony as to same fact.
>
> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact *at or about the time when the fact took place*, or before any authority legally competent to investigate the fact, may be proved. (Emphasis added.)

[124] The words 'at or about the time when the fact took place' found in s 157 of the Evidence Act has been interpreted in *Public Prosecutor v Teo Eng Chan & Ors* [1988] 1 MLJ 156; [1988] 1 CLJ 425; [1988] 2 CLJ Rep 793, *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106; [1990] 2 CLJ 833; [1990] 2 CLJ Rep 804, and *Public Prosecutor v Mohammad Terang bin Amit* [1999] 1 MLJ 154; [1999] 5 CLJ 156, to mean 'the first reasonable opportunity' or 'as speedily as could reasonably be expected'.

[125] In the present case, it was unequivocally evident that the police reports filed by the petitioner and the children did not adhere to the principle of contemporaneity. They were not submitted 'at or about the time when the fact took place', a critical factor that would qualify them as contemporaneous documents. Consequently, these reports, inherently self-serving, were

significantly undermined in their credibility and effectiveness. Their value as evidentiary material, therefore, was entirely negligible. In fact, there was a very high probability that the police reports lodged by the petitioner and the children were an afterthought.

[126] The actions of the petitioner were not merely concerning for their apparent intent; they also illuminated the extent to which the petitioner was prepared to go in both fortifying her case and employing the children as instruments to sully the respondent's name and reputation. Such tactics were troubling, not only for their ethical implications but also for the psychological and emotional impact they may have had on the children.

[127] Additionally, I found it imperative to address the petitioner's conduct in bringing WYL to court for the majority of the hearing days, despite the fact that WYL, being a special needs child, experienced great discomfort, as evidenced by his several distressing episodes in the courtroom and his attempts to lie down whenever possible. This underscored the insensitivity of the petitioner's actions in exposing WYL to the taxing environment of a courtroom for extended periods. Such conduct raised serious concerns about the petitioner's motives, particularly whether this exposure was strategically orchestrated to elicit sympathy from the court.

[128] In evaluating the appropriateness of such conduct of the petitioner, I was guided by the precedent set in *Re P (A Child: Remote Hearing)* [2020] EWFC 32. This case underscored the relevance of considering the conduct and demeanour of witnesses not just when they were actively participating in proceedings, such as being in the witness box, but throughout the entire duration of the court hearing, even when they have retreated to the gallery or well of the courtroom.

[129] In light of this analysis, it was my assessment that the allegations brought forth were not grounded in truth but were instead a deliberate construct by the petitioner. This strategy not only aimed at strengthening her case through unfounded claims but also involved coaching the children into supporting this narrative, thereby manipulating the legal process to her advantage. This deliberate act of fabrication, especially involving allegations of such a serious nature, was deeply concerning and reflected on the integrity of the claims made by the petitioner against the respondent.

[130] It also became imperative to highlight the petitioner's decision to have the children testify against the respondent. This action revealed a marked estrangement within the family, characterised by an evident lack of affection or respect that one would normally expect children to have towards a parental figure. This alienation was vividly illustrated through the testimony of SP3, the

petitioner's son from a previous marriage, who described the respondent as cruel. Significantly, this characterisation was not based on claims of direct mistreatment or neglect, but was attributed to the respondent's unwillingness to lavish SP3 with gifts or to finance his education abroad.

[131] At this point, it was important to emphasise that no parent should be obligated to fund his or her child's education abroad solely at the child's behest. It was noteworthy that the respondent was open to supporting SP3's education within local institutions, a gesture that underscored a commitment to SP3's academic pursuits, albeit within reasonable limits. However, SP3's response to this offer revealed a perspective that seemingly regarded overseas study not as a privilege, but as an entitlement. The lack of appreciation for the stepfather's willingness to finance local studies painted SP3 as somewhat demanding and entitled.

[132] The children's resentment against the respondent extended to a very public display on social media where SP3, in particular, had vented against the respondent on Facebook, contents of which were disparaging.

[133] With regard to WYL, the petitioner had accused the respondent of neglecting WYL's education and other special needs. However, this accusation lacked basis, as there was no evidence adduced to delineate what specific needs WYL had, nor what appropriate measures should have been taken with regard to his education. Moreover, in the event that the respondent had opted not to pursue certain educational paths for WYL, the petitioner's own inaction in this matter could not be overlooked. This inaction further cemented my perspective that the issue regarding WYL's education was baseless and lacked evidence to be considered a genuine point of contention.

[134] It was also critical to address the petitioner's decision to call the children as witnesses, to testify on her behalf. Despite this seemingly strategic choice, an examination of their testimonies revealed a lack of reliability that could not be ignored. At this stage, it was pertinent to invoke s 134 of the Evidence Act, which offers clarity on the matter by stating:

> Section 134 — Number of witnesses
>
> No particular number of witnesses shall in any case be required for the proof of any fact.

[135] The importance of s 134 was highlighted in several cases including *Collins Chigbo Chima v Public Prosecutor* [2019] MLJU 84; [2019] 1 LNS 107, and *Public Prosecutor v Hassan Jafarpour* [2019] 5 MLJ 350; [2019] 9 CLJ 216.

[136] At this juncture, reference was made to *Khaw Cheng Bok & Ors v Khaw*

Cheng Poon & Ors [1998] 3 MLJ 457; [1998] 1 LNS 340 where in dealing with the issues concerning the validity of wills, Jeffrey Tan J (as he then was), succinctly laid down the importance of a credible witness:

> Section 134 [of the Evidence Act] follows the maxim, *testimonia ponderanda sunt non numeranda*, that testimony is to be weighed and not counted. '... more regard is to be paid to the character of the evidence adduced in support of case than to the number merely of the witness who gave it; for the *evidence of two respectable and credible witnesses is of more value than of a dozen witnesses of notoriously abandoned and profligate character'*
>
> (*Trayner's Latin Maxims* at p 599). '... t*he court is concerned with the quality and not quantity of evidence*' [*Sarkar* at p 1958]. The weight to be attributed to evidence, *testibus non testimoniis credendum est*, 'depends upon the character and credibility of a witness more than upon the probability or improbability of his statements. The value of the evidence given is to commensurate with the honesty and truthfulness of the witness; evidence as to an improbable fact spoken to by a witness above all suspicion deserves and receives more weight than the evidence of a doubtful or incredible witness regarding a fact itself very probable (*Trayner's Latin Maxims* at p 599). (Emphasis added.)

[137] Further illustration may be found in the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912, where Gopal Sri Ram JCA (as he then was) explained with clarity:

> I would also refer to s 134 of Evidence Act 1950 which is, in my opinion, relevant to the point under consideration. That section is in the following terms:
>
> > 134. No particular number of witnesses shall in any case be required for the proof of any fact.
>
> In *Vadivelu Thevar v State of Madras* AIR 1957 SC 614, Sinha J, when delivering the unanimous decision of the Indian Supreme Court, drew attention to the material differences between English law on the subject and the law as enacted in s 134 of the Indian Evidence Act, 1872 (which is identical to our s 134), and said (at p 619):
>
> > The Indian Legislature (and I might add the Malaysian Parliament) has not insisted on laying down any such exceptions to the general rule recognized in s 134 quoted above. The section enshrines the well recognised maxim that *'Evidence has to be weighed and not counted.'* Our legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.
>
> Again in *Ram August Tewari & Ors v Bindeshwari Tewari & Ors* AIR 1972 Pat 142, at page 144, the Court made this important observation:
>
> > The evidence of every witness is to be judged on its own merits and if there is nothing in his evidence or in the evidence of other witnesses examined in the case to discredit him, it cannot be disbelieved on the ground that there is only one witness on the point and no other witness has been examined to support him.

A The foregoing statements of principle are, in my judgment, a sufficient answer to the arguments advanced by the appellants. Nevertheless, I would add my own views to those already expressed in the several authorities cited.

It must be borne in mind that when it comes to the quality of evidence, each case depends upon its own facts. In some, it might be foolish not to call further evidence; B in others, it may be unnecessary. (Emphasis added.)

[138] Although the children had testified against the respondent, aligning with the petitioner's narrative, they did not intrinsically strengthen the petitioner's position. On the contrary, upon careful examination, their C testimonies were unreliable due to being largely irrelevant, implausible, contradictory, and evidently biased. From my analysis, it appeared that the involvement of the children, rather than bolstering the petitioner's case, had the effect of undermining it.

D

[139] Given that the petitioner has not succeeded in substantiating the claims of adultery and abuse, the crux of the matter shifted to discerning the actual cause of the breakdown of the marriage. This determination was crucial, as it bore significant weight on the amount of maintenance the petitioner was E entitled to receive.

Whether breakdown of marriage due to petitioner's alcoholism

[140] The respondent contended that the primary catalyst for the breakdown F of the marriage was the petitioner's struggle with alcoholism, which he claimed was unreasonable behaviour, thus invoking s 54(1)(b) of the Law Reform (Marriage and Divorce) Act as alluded to earlier.

[141] The test in determining what is unreasonable behaviour had been G expounded by Dunn J in *Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All ER 766, where His Lordship posed the following question:

Would any right-thinking person come to the conclusion that this husband (wife) has behaved in such a way that the wife (husband) cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters H and personalities of the parties.

[142] The respondent asserted that attempts to address her drinking habits had led to discord in their relationship, as the petitioner resisted efforts to curtail her alcohol consumption. In corroboration of this claim, the I respondent summoned his brother as a witness ('SR3'), who provided testimony attesting to the petitioner's frequent episodes of binge drinking and her apparent inability to manage her alcohol intake. This testimony was further substantiated by photographs, which purportedly depicted instances of the petitioner's excessive drinking.

[143] While there was no conclusive evidence establishing the petitioner as an alcoholic, the evidence adduced pointed to her penchant for alcohol consumption. It was apparent that, as a socialite and the spouse of a prominent businessman, the petitioner took pleasure in both hosting and attending social gatherings. However, the respondent held the view that the petitioner should temper her inclination towards socialising, perhaps influenced by his perception of her role as a mother of six children and a middle-aged woman, rather than a 'footloose and fancy-free' adolescent.

[144] In my view, the petitioner felt constrained by the respondent's attempts to dictate her lifestyle choices. For example, the respondent acknowledged resorting to punitive measures such as threatening to 'fine' the petitioner for reading too many novels and imposing 'punishments' for instances of intoxication after social events. These incidents painted a picture of increasing control exerted by the respondent over the petitioner's life and choices, indicative of a pattern of behaviour that encroached upon the petitioner's autonomy and independence.

[145] As the children gradually began to leave the household, it became evident that the petitioner, feeling suffocated and desiring autonomy, embarked on a mission to gather evidence against the respondent, presumably to strengthen her legal position and secure a favourable financial settlement. The meticulous nature of her planning became unmistakably clear when she solicited a substantial sum of MYR300,000 from the respondent. This amount was transferred to her through one of the companies shortly before her departure from the matrimonial home, indicating a premeditated strategy underlying her actions.

[146] In my view, the marriage had run its natural course. It seemed clear that the petitioner initially viewed the union as a means of ensuring financial stability for herself and SP3. Despite subsequently having five children with the respondent, she remained in the marriage primarily for convenience and financial security. Conversely, the respondent admitted to marrying the petitioner more out of a sense of duty rather than genuine affection, as she had become pregnant out of wedlock.

[147] The respondent, despite providing for his family financially, assumed an absentee role in fatherhood, leaving the petitioner to shoulder the responsibilities of running the household and caring for the children single-handedly. The evidence adduced suggested that the respondent allocated the majority of his time to socialising with friends and business associates, leaving the petitioner to fulfill the role of mother, wife and hostess.

[148] It was my conclusion, therefore, that while neither adultery nor abuse was proved, both parties bore equal responsibility for the irretrievable breakdown of their marriage. This finding would, therefore, have a bearing on the amount of spousal maintenance that the petitioner was entitled to receive.

Whether petitioner had fulfilled the 'means and needs' test

[149] It was imperative to highlight that in determining the issue of spousal maintenance, s 78 of the Law Reform (Marriage and Divorce) Act placed significant emphasis on the 'means and needs' of both parties. This provision, therefore, necessitates a comprehensive examination, not only of the petitioner's means but also of the respondent's.

[150] With regard to the petitioner's claim for spousal maintenance, she sought a monthly sum of MYR18,000, or alternatively, a lump sum payment totaling MYR8m. Conversely, the respondent argued that a monthly payment of MYR7,000, consistent with the interim order granted by this court in April 2022 ('the interim order') in response to the petitioner's application in Originating Summons No WA-24F-313–10 of 2020, should suffice. I took the position that a lump-sum payment of MYR8m was unjustified, for the following reasons.

[151] Whilst it was acknowledged that the Law Reform (Marriage and Divorce) Act does not currently encompass a provision for the disbursement of maintenance in the form of lump sum payments, the court's attention was brought to the case of *Chaw Anui v Tan Kim Chai* [2004] 4 MLJ 272; [2004] 5 AMR 671, where it was the view held by Low Hop Bing J (as he then was), after referring to the situation in the United Kingdom and Singapore, that courts in Malaysia may make an award of maintenance by way of lump sum payment, if need be:

> 69. At this stage, it is appropriate to consider the power of the courts in the United Kingdom, Singapore, and Malaysia in making a maintenance order by way of a lump sum payment.
>
> 70. In the United Kingdom, the power to order a lump sum payment is contained in s 2(1)(c) of the Matrimonial Proceedings and Property Act 1970; and has been ordered, eg in *Wachtel v Wachtel* [1973] 1 All ER 829; *Preston v Preston* [1982] 2 AER 41 (CA); and *Minton v Minton* [1979] AC 593.
>
> 71. In Singapore, s 109(1) of the Women's Charter provides that a maintenance order may provide for the payment of a lump sum or such periodical payment as the court may determine, and so awards of a lump sum payment have been made, eg in *Jacqueline Bey v Edmond Lee Yok Lung* [1988] 2 MLJ 335 per Chua J; *Louis Pius Gilbert v Louis Anne Lise* [2000] 1 SLR 274 per Goh Joon Seng J; *Koh Kim Lian Angela v Choong Kian Haw* [1994] 1 SLR 22 Singapore (CA), per Karthigesu JA; and *Lee Puey Hwa v Tay Cheow Seng* [1991] 3 MLJ 1 (CA) per Yong Pung How CJ.

72. In Malaysia, under s 77(1)(a), our High Court may order a man to pay maintenance to his wife or former wife during the course of any proceedings under the Act. In my view, the power to make such an order is not confined to the award of maintenance by periodical payments only. Section 77(1)(a) contains no restrictive or prohibitive words to support the contention for the husband. The discretionary power of the court under s 77(1)(a) is unfettered in the sense that our court is empowered to make an award of maintenance by way of a lump sum payment having regard to the facts and circumstances prevailing in a particular case and established judicial principles.

73. Such lump sum payments have been made, eg:

(1) in *SS v HJK* [1991] MLJU 18; [1991] 1 LNS 99 per Mahadev Shankar J (later JCA) by way of a 'clean break';

(2) *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 per Mahadev Shankar J (later JCA) to assist the wife to maintain herself and the children of the family and not as a separate head of entitlement, but a different method of providing for the immediate requirements of the deserving spouse and the children where the circumstances so require;

(3) *V Sandrasagaran Veerapan Raman v Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474 per Faiza Tamby Chik J by applying the 'clean break' principle; and

(4) *Tham Yin Kee (p) v Lim Hee Peng* [2002] MLJU 185; [2002] 1 LNS 9 per Rahman Hussain J (now FCJ).

74. Hence, there are abundant authorities to the effect that the courts in England, Singapore and our country may make an award of maintenance by way of a lump sum payment.

[152] Although I would not disagree that this court is empowered to award lump-sum payments in specific circumstances, it was essential to note that the requested amount of MYR8m by the petitioner in this instance appeared excessive and lacked basis. The petitioner had not provided adequate justification for this figure beyond asserting the respondent's alleged history as a negligent payer and potential evasion of monthly spousal maintenance obligations. Consequently, it remained unclear how this specific sum was determined or warranted in the context of the case.

[153] In my view, the petitioner's rationale was untenable as it lacked relevant evidence. Even if such evidence existed, it would not warrant a lump sum payment of MYR8m, which in my view, appeared to be punitive than reflective of actual means and needs. Nevertheless, I took the position that the petitioner should be awarded monthly spousal maintenance.

[154] In her pleadings, the petitioner contended that a monthly sum of MYR18,000 was necessary to sustain the lifestyle she enjoyed during the marriage.

[155] At this juncture, it was crucial to remind parties that there is no guaranteed continuity in the exact standard of living for a spouse, post-divorce. The reality is that financial arrangements, asset division, and spousal support can vary widely, leading to different outcomes in different cases. While the legal system strives to achieve fairness, it cannot ensure identical outcomes for every divorcing couple due to the multifaceted nature of individual circumstances. Hence, all that the court has to ensure is that there is not a drastic change in the living conditions of the spouse receiving maintenance, especially if the marriage lasted for a significant duration.

[156] I am mindful of the case *In Re Borthwick, decd Borthwick and another v Beauvais and others* [1949] Ch 395, which has been cited in numerous Malaysian cases. The following is the oft-quoted passage by Harman J:

> It is said that maintenance is the only thing you can look at. What does that mean? It does not mean you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or not, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she lives, and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only mere subsistence.

[157] In revisiting the case of *In Re Borthwick, decd Borthwick and another v Beauvais and others*, it was important to address a common misconception stemming from its frequent misinterpretation. This landmark decision, rendered 75 years ago, has been invoked in various contexts that occasionally stretch beyond its original purview. The core dispute revolved around the financial entitlement of the testator's wife following a significant change in their marital and financial circumstances.

[158] Initially, the couple faced financial hardship, leading to the testator's bankruptcy. This economic downturn prompted the wife to move back with her parents. Despite these challenging times, the testator managed to provide his wife with a weekly allowance of GBP3 — a commitment he upheld even after his fortunes took a dramatic turn for the better, elevating him from financial distress to considerable wealth. The crux of the legal issue was not simply the amount of financial support the wife received but rather the

appropriateness of this support given the drastic improvement in the testator's financial situation. The court ultimately determined that the wife's entitlement extended far beyond the symbolic GBP3 per week, recognising the need to reflect the changed economic status in her financial maintenance.

[159] *In Re Borthwick, decd Borthwick and another v Beauvais and others*, exemplifies the effort by the judicial system to ensure fairness and equity in financial arrangements post-marriage, particularly in light of significant changes in a party's financial capacity. It serves as a poignant reminder of the court's role in adapting legal outcomes to the realities of life's unpredictable economic shifts, rather than rigidly adhering to arrangements that no longer reflect current circumstances.

[160] In my analysis, I drew valuable insights from the Singaporean legal precedents set forth in the cases of *Foo Ah Yan v Chiam Heng Chow* [2012] 2 SLR 506, *ATE v ATD* [2016] SGCA 2, and *VPU v VPT* [2021] SGHCF 11. These cases, being of a more contemporary nature, provided a pragmatic perspective on the issue of spousal maintenance post-divorce, particularly concerning the wife's entitlement.

[161] Central to these rulings is the principle of financial preservation, which dictates that the maintenance awarded should, within reason, reflect the standard of living enjoyed by the wife during the marriage. However, this principle is not applied rigidly. Instead, the courts have advocated for a 'commonsense holistic approach' that acknowledges the altered financial landscape following a divorce.

[162] This nuanced approach underscores a key reality: post-divorce, both parties must adjust to a new economic reality, wherein maintaining an identical standard of living to that of the marriage is unfeasible. The financial pool that once supported a single household now must stretch to cover two, inherently reducing the available resources for each party.

[163] Hence, while the aim is to avoid a drastic decline in the wife's standard of living, the expectation of replicating the marital standard is both unrealistic and legally unsupported. These cases collectively highlight the balance the courts seek between fairness and pragmatism, acknowledging the economic consequences of divorce and the need to adapt to a changed financial circumstance without clinging to past lifestyles.

[164] In the current case, the petitioner herself disclosed that she led a lifestyle primarily dedicated to caring for the children and hosting gatherings for the respondent's business contacts. Given this context, I was unable to agree with the petitioner's request for monthly maintenance of MYR18,000, especially

considering that following the divorce, the petitioner would no longer be obligated to fulfill the role of a high-profile businessman's wife, entertaining guests and maintaining a lavish lifestyle.

[165] It was worth noting that in the interim order, the petitioner was granted MYR7,000 monthly, allocated solely for groceries for herself and the children, as the respondent was still covering other household expenses at that time. However, in the current circumstances, spousal maintenance was expected to cover all of the petitioner's personal expenses. As such, a monthly sum of MYR7,000 would be insufficient.

[166] The petitioner adduced a breakdown of her expenses to support this claim as indicated in Tables A and B below. However, during cross-examination, she conceded that MYR10,000 monthly would adequately cover her needs. I agreed with her concession and awarded her a monthly amount of MYR10,000. I also have to state that this concession made by the petitioner fortified my view that a lump sum amount of MYR8m was not justified. The sums awarded by the court are reflected in the third column of Tables A and B below:

Table A

Items	Petitioner's Claim (monthly) in MYR	Courts decision
Groceries	5,500	MYR5,000 for both food and groceries
Food	4,000	
Petrol and toll	600	600
Electricity and Water	700	700
Internet	150	150
Telephone	120	120
Clothes and shoes	600	600
Hair	600	600
Medicines, supplements, and Clinical therapy	1,200	500
Total	13,470	8,270

Table B

Items	Petitioner's claim (annual) in MYR	Courts decision
Dental	3,000	3,000
Examination	4,500	2,000
Pest control	2,000	1,000
House maintenance	5,000	3,000

Service of air condition and water dispenser	2,000	1,000
Electrical and electronic appliances	20,000	10,000
Total (annual)	37,500	20,000
Total (monthly)	3,125	1,666

[167] Upon close examination, I observed that some of the expenses listed by the petitioner were inflated. For instance, her claimed monthly food bill amounted to MYR9,000, which seemed unreasonably high. Consequently, I consolidated the costs of groceries and food into a single category, totaling MYR5,000.

[168] The monthly bill for medicines, supplements, and clinical therapy was initially stated as MYR1,200, yet the purpose of clinical therapy remained unspecified. Therefore, I adjusted this expense to MYR500 per month.

[169] Certain annual expenses were also exaggerated. For instance, the petitioner's claim for the annual cost of a physical examination at MYR4,500 lacked justification, leading me to revise it down to MYR2,000. Similarly, expenses such as pest control, air conditioning servicing, and house maintenance appeared redundant or overlapping. As a result, I reduced the costs of pest control to MYR1,000, air conditioning servicing to MYR1,000, and house maintenance to MYR3,000, aligning them more reasonably with the actual needs of the household.

[170] The petitioner additionally claimed an annual sum of MYR20,000 for electrical and electronic appliances without providing a breakdown of these items or the rationale behind the cost. In light of this lack of clarity, I deemed it appropriate to reduce the amount to MYR10,000 monthly.

[171] Upon careful consideration, the total monthly spousal maintenance for the petitioner alone, as outlined in the third column of Tables A and B, amounted to MYR9,936, which I rounded up, for simplicity and practicality, to a monthly sum of MYR10,000.

[172] It was also essential to emphasise that the primary objective of any divorce settlement should be to ensure that parties to the marriage have sufficient resources to move forward with their lives as smoothly as possible. I, therefore, had to take into account the fact that the petitioner was granted a more than fair share of the division matrimonial assets, as highlighted in the Singapore case of *ATE v ATD* [2016] SGCA 2.

[173] Additionally, in determining the monthly amount of spousal maintenance, it could not be overlooked that the petitioner bore equal responsibility for the breakdown of the marriage.

[174] Therefore, I concluded that a monthly spousal maintenance amount of MYR10,000 was both reasonable and equitable, especially considering that the *petitioner had, during the hearing of the divorce petition, agreed to accept such sum*.

Whether respondent was obliged to pay child maintenance

[175] With regard to child maintenance, the petitioner, during trial, had asked for MYR3,000 each for two children only, namely, WYL who is a special needs child, and SP4, the youngest child who is currently pursuing his tertiary education.

[176] It is trite law, pursuant to s 92 of the Law Reform (Marriage and Divorce) Act, that every parent has the duty to maintain his or her child, regardless of who has custody. The provision reads:

> Section 92 — Duty to maintain children
>
> Except where an agreement or order of court otherwise provides, it shall be the *duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody* or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof. (Emphasis added.)

[177] Section 93 of the Law Reform (Marriage and Divorce) Act takes an even more comprehensive stance by expressly articulating the responsibility of a man to provide maintenance for the betterment of his child. The provision reads:

> Section 93 — Power for court to order maintenance for children
>
> (1) The court may at any time *order a man to pay maintenance for the benefit of his child* —
>
> (a) if he has refused or neglected reasonably to provide for the child;
>
> (b) if he has deserted his wife and the child is in her charge;
>
> (c) during the pendency of any matrimonial proceedings; or
>
> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
>
> ... (Emphasis added.)

[178] In the case of SP4, although he was above 18 years of age, he was still pursuing his studies. Reference, therefore, was made to s 95 of the Law Reform

(Marriage and Divorce) Act, which reads:

> Section 95 — Duration of orders for custody and maintenance
>
> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the *attainment by the child of the age of eighteen years or* where the child is under physical or mental disability, *or is pursuing further or higher education or training*, on the ceasing of such disability or completion of such further or higher education or training, whichever is the later. (Emphasis added.)

[179] As I had alluded to earlier, the clauses in the marital agreement pertaining to child maintenance were not valid as they were unreasonable and unfair. Moreover, when the marital agreement was signed, WYL was not even born.

[180] In my view, a monthly sum of MYR3,000 for each child was a fair and reasonable sum. However, it was imperative to note that this provision does not encompass the expenses related to education and healthcare for the two sons. These additional costs are to be entirely shouldered by the respondent, albeit contingent upon his consent. This measure was instituted to prevent potential instances of financial exploitation by the petitioner.

[181] During the proceedings of the divorce petition, it came to light that both the petitioner and the children had taken unilateral actions, enrolling in courses without consulting the respondent and with the expectation that he would foot the bill. In my view, the consent of the respondent was indispensable in such matters. Without his explicit approval, he could find himself obligated to cover expenses for which he did not provide consent. Such a scenario would undeniably be deemed unreasonable and unjust from the respondent's perspective.

ACCESS

Whether respondent was entitled to access to WYL

[182] The respondent had also prayed for reasonable access to WYL. However, I took the position that granting such access at this juncture would not be appropriate. Given that the respondent faced charges related to SP1 and SP2, and considering WYL's status as a special needs child, supervised access by the petitioner would be essential.

[183] In light of the ongoing criminal proceedings against the respondent, it was imperative to minimise contact between the respondent and the petitioner, especially since she is a potential witness in these proceedings. Therefore, until the criminal proceedings are resolved, access to WYL should be withheld. The

respondent retained the right to apply the court to vary this provision of the court order once the criminal case has concluded.

Division of matrimonial assets

[184] The task of dividing matrimonial assets is prescribed by s 76 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 76 — Power of court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subs. (1) the court shall have regard to:
>
> (a) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage;
>
> (d) the duration of the marriage;

[185] I was also guided by the Court of Appeal in *Annathurai a/l Venkidasalam v Vani a/p Welluven* [2023] MLJU 2442; [2023] CLJU 2191 where Lim Chong Fong JCA had opined in the following passage:

> ...
>
> [18] In re-visiting s 76 of the LRA, and we make the following observations:
>
> (i) Albeit it is stated in s 76(2) of the LRA that the court shall incline towards equality, it is however not mandatorily 50%-50% in dividing the matrimonial property and assets;
>
> (ii) The division is at the discretion of the court but the court must take into account the factors listed in s 76(2)(a) to (e) of the LRA;
>
> (iii) *There is no prohibition on the court to also take into account other relevant or appropriate circumstances* because the aforesaid factors have not been expressly specified in s 76(1) and (2) of the LRA as exclusive and/or exhaustive, see *Dean v Wiesengrund* [1955] 2 QB 120 and *S (a minor) v Special Education Needs Tribunal* [1996] 1 All ER 171; and
>
> (iv) *The division is not an exercise of strict financial accounting but a fair and equitable distribution of the matrimonial property and assets as determined by the court.*

[19] Therefore, there is no strait-jacket solution. *Each and every case has to be determined on its peculiar facts and circumstances.* (Emphasis added.)

[186] As far as the matrimonial assets were concerned, the petitioner demanded an equal split, claiming 50% of all the assets acquired by the respondent during the marriage, including immovable properties, company assets, vehicles, funds in the respondent's fixed deposit bank accounts, and his EPF.

Whether petitioner entitled to half of the value of immoveable properties

[187] In Table C below, the petitioner provided a list of the immovable properties, although it was important to note that she attempted to assess their value independently. I took the position that an independent valuer (to be agreed to by both parties) should be engaged to accurately determine the current value of these properties.

[188] The division of immovable properties, the percentage of which was granted by the court to the petitioner, was outlined in the last column of Table C below. In the interest of privacy, the immovable properties were described in general terms without reference to their specific addresses:

Table C

No	Particulars of Property	Date Acquired	Cash/ Loan	Court's decision on division of property
1	Batu Buruk (Matrimonial Home)	9 May 2001	Cash	50%
2	Jalan Ladang	6 August 2009	Cash	30%
3	Marang	9 November 2009	Cash	30%
4	Kompleks Kg Tiong	7 October 2009	Cash	30%
5	Padan Midin (1)	7 September 2010	Cash	30%
6	Padan Midin (2)	28 January 2010	Cash	30%
7	Austin Heights	5 September 2010	Loan	30%
8	Batu Buruk	6 May 2010	Loan	30%
9	Plaza Berjaya (1) (50%)	19 February 2013	Cash	15%
10	Perhentian	30 September 2014	Cash	15%
11	Plaza Berjaya (2) (50%)	16 October 2015	Cash	15%

12	Plaza Berjaya (3) (50%)	29 July 2015	Loan	15%
13	Kuala Berang	2 May 2017	Loan	5%
14	Banggol (51%)	5 May 2017	Loan	5%
15	Taragon (1)	19 March 2018	Loan	5%
16	Taragon (2) (50%)	2 April 2018	Loan	5%
17	Taragon (3)	10 April 2018	Loan	5%
18	Pulai (25%)	21 November 2018	Cash	5%
19	Taragon (4)	24 December 2018	Loan	5%
20	Taragon (5)	24 December 2018	Loan	5%
21	Mutiara V	26 December 2018	Loan	5%
22	Taragon (6)	28 February 2019	Loan	No division
23	Taragon (7)	28 February 2019	Loan	No division
24	Setapak	24 July 2019	Loan	No division
25	Taragon (8)	5 August 2019	Loan	No division
26	Downtown (1)	8 August 2019	Loan	No division
27	Angkasa	28 August 2019	Loan	No division
28	Downtown (2)	3 September 2019	Loan	No division
29	Pudu Plaza	4 September 2019	Loan	No division
30	Taragon (9)	1 December 2019	Loan	No division
31	Taragon (10)	23 January 2020	Loan	No division
32	Tapu (80%)	29 February 2020	Cash	No division
33	Taragon (11)	3 March 2020	Loan	No division
34	Taragon (12)	9 July 2020	Loan	No division
35	Tanggul (1) (80%)	3 September 2020	Cash	No division
36	Tanggul (2)	17 September 2020	Cash	No division

[189] Such division was based on the following reasons.

[190] In deciding the division of the immoveable properties in Table C, I primarily considered the duration of the marriage, which spanned almost 24 years. While it was acknowledged that the petitioner had not made direct monetary contributions towards the immoveable properties, it was undeniable that she had dedicated herself to caring for the children throughout this period, including five from the marriage and one from a previous relationship. The petitioner's social life consisted of entertaining the respondent's friends and business associates, whilst her responsibilities extended to managing the household.

[191] Her contribution towards the marriage, therefore, could not be ignored. Her unwavering commitment to nurturing the children and maintaining the matrimonial home for over two decades facilitated the respondent's ability to

pursue his career and amass considerable wealth. Thus, her role in enabling the accumulation of matrimonial assets was integral and could not be overlooked in the division process.

[192] The respondent argued that the petitioner had fully benefited from the privileges associated with being the spouse of a successful entrepreneur. He asserted that her decision not to pursue employment stemmed from laziness and a belief that she could rely on the generous support provided by him. Furthermore, the respondent claimed that it was the petitioner who had actively pursued him, viewing him solely as a convenient source of financial security for herself and SP3.

[193] Although it was evident that the petitioner entered into the marriage with the intention of securing financial stability for herself and SP3, I had to disagree with the respondent's assertion that the petitioner had trapped him into marriage. The fact of the matter is that life within a marriage is a journey through uncharted territory, where the path ahead is never entirely predictable.

[194] When the parties entered into marriage, they could not have foreseen the challenges they would have had to face with their first child, WYL, who was born with special needs. The respondent's involvement with WYL was notably less than the petitioner's, who demonstrated greater attentiveness and sensitivity to the WYL's needs. Acknowledging the petitioner's significant role in caring for the children and managing the household, particularly in the matrimonial home (Property No 1 in Table C), I awarded her 50% of its current value. This decision was made considering that the respondent had complete ownership of the matrimonial home, devoid of any pending loans or mortgages.

[195] In considering the division of the other immoveable properties in Table C, I took into careful consideration both the acquisition dates of such properties and any outstanding loans associated with them. Accordingly, for Properties Nos 2 to 8 in Table C, I decided that the petitioner should be entitled to 30% of the realisable value or equity in these properties. For clarity, 'equity' here refers to the current value of the property, after deducting debts or liabilities.

[196] As far as Properties 9 to 12 in Table C were concerned, the petitioner's entitlement extended to 15% of the respondent's share, while for Properties 13 to 21 in Table C, it amounted to only 5% of the respondent's share. These percentages reflected the date of acquisition of such properties and the presence of outstanding loans.

[197] It was my view that Properties 22 to 36 in Table C were not eligible for division in favour of the petitioner. Given the deteriorating state of the marriage at the time of acquisition, coupled with minimal contribution and substantial outstanding loans, no allocation was justified.

[198] I had also mandated equal sharing of the valuation costs for the immoveable properties between the petitioner and respondent. In the event of disposal by the respondent of any of the immoveable properties, the petitioner was to equally share the associated costs and fees. The petitioner's share in the immoveable properties, as determined by the court, was to be disbursed within nine months of the decision date, which was delivered on 20 February 2024.

[199] The court was apprised of the fact that the petitioner was currently residing at the Plaza Berjaya apartment, a property jointly held in the names of the respondent and his business associate, Lim Bee Suan. This development came in direct contravention of the interim order, which unequivocally mandated the petitioner to vacate the aforementioned premises and to take up residence in an alternative accommodation to be furnished by the respondent. The petitioner's outright refusal to comply with this order not only underscored her reluctance but also signified a deliberate defiance of the court's authority.

Whether petitioner entitled to half of the monies in EPF, and fixed deposits

[200] The petitioner had also made claims against monies in the respondent's EPF and fixed deposit bank accounts, as outlined in Table D below:

Table D

No	Particulars
1	KWSP EPF @22 March 2021
2	Fixed Deposit — Ambank #1, **********276
3	Fixed Deposit — Ambank #1, **********287
4	Fixed Deposit — Ambank #1, **********708
5	Fixed Deposit — CIMB (A/C **********001)
6	Fixed Deposit — Bank Rakyat (A/C **********31-9)

[201] The respondent challenged the figures reported in these accounts, asserting that a portion of the funds was being held in trust for members of his family. For instance, he claimed for return of the sum of MYR200,000 on his averment that it was given to him by his mother. The respondent had also demanded the petitioner to return MYR300,000 which she had borrowed from one of the companies, namely, Pustaka Seri Intan Sdn Bhd, and for an insurance policy worth MYR1,318,793.51 left by the respondent's father to the respondent to be deducted from the matrimonial assets.

[202] I found the respondent's contention untenable. Firstly, there was no evidence adduced to substantiate his claim that the disputed monies were indeed held on trust for or on behalf of the respondent's mother.

[203] As far as the insurance policy was concerned, the petitioner was awarded only a portion of the monies in the respondent's fixed deposit bank accounts and EPF. Hence there was no basis for any deduction to be made from the respondent's assets.

[204] In evaluating the respondent's testimony, I was inclined to view him as a witness who was not entirely forthright, particularly concerning his finances and assets. His approach to financial disclosure was marked by evasion and a clear reluctance to disclose the full extent of his wealth. While he was not expected to provide his family with undue extravagance, his extreme frugality, something he himself acknowledged, reflected a deeper inclination towards withholding financial support, even in matters concerning the well-being of his family.

[205] Taking into account the duration of the marriage and the petitioner's contributions to the household and family life, I concluded that the petitioner was justly entitled to a 25% share of the monies in the fixed deposit bank accounts as of 20 February 2024. This sum was to be disbursed to the petitioner within 21 days from the date this decision was delivered, namely, 20 February 2024.

[206] With regard to the monies in the respondent's EPF, the respondent argued that he had started his EPF contribution before the marriage. I was mindful of that fact but it was undisputed that the continuous contributions throughout the marriage had classified the monies in the EPF as matrimonial asset. Therefore, it was subject to division in accordance with s 53A of the Employees Provident Fund Act 1991, reflecting the joint financial partnership inherent in the matrimonial relationship. The provision reads:

> Section 53A — Transfer of credit of a member of the Fund in accordance with the division of matrimonial assets order
>
> (1) Notwithstanding section 51, when an order is issued by a court that part of the sums of money standing to the credit of a member of the Fund is matrimonial asset, *the Board may, after being served with the sealed order, transfer the sum of money as ordered by the court* from the account of a member of the Fund into the account of the receiver named in the order subject to any terms and conditions as prescribed by the Board. (Emphasis added.)

[207] My view that the petitioner was entitled to only a 25% share of the monies in the respondent's EPF was guided by careful consideration of the EPF's fundamental objective, that is, to ensure financial security for employees

upon retirement. The EPF scheme facilitates the accumulation of savings through regular contributions from both the employee and employer, earmarking a portion of the employee's earnings for future financial stability. It was imperative to ensure that the respondent's access to these funds was not so significantly diminished as to jeopardise his ability to sustain himself post-retirement. Given that the respondent was already mandated to fulfill obligations towards spousal and child support, it was essential for the court to strike a balance that afforded him a measure of financial security in his later years.

[208] Therefore, the petitioner's entitlement of 25% of the monies in the respondent's EPF, as it stood on 20 February 2024 was intended to reflect this equilibrium.

Whether petitioner entitled to the Porsche

[209] Regarding the petitioner's claim to the respondent's Porsche, it was worth noting that this demand, made in Originating Summons No WA-24F-313–10 of 2020 reported as *HLC v PTL* [2022] MLJU 1370; [2022] CLJU 1427, had been dismissed by this court via the interim oder. The court's reasoning in that decision underscored the following considerations:

> [35] In my view, the plaintiff had failed to justify her need for the vehicle. Furthermore, it was undisputed that the vehicle was used by the defendant during the subsistence of the marriage for his business image and frequent long distance travelling. In comparison, the plaintiff was a stay-home mother, and although she may need a vehicle for her mobility, there was no need for her to have that particular vehicle. The plaintiff should bear in mind that her lifestyle was financed by the defendant and with this separation, although the court is minded to ensure that such lifestyle, as the one that she was accustomed to, is maintained, the cost of such lifestyle must not be unreasonable, or such as to financially cripple the defendant.
>
> [36] I, therefore, was of the view that *the vehicle should be returned to the defendant and the defendant should provide an alternative car for the plaintiff*, as long as such car is reasonably fit for purpose. (Emphasis added.)

[210] However, it was brought to my attention that the petitioner had refused to adhere to the terms of the interim order, specifically in returning the Porsche in exchange for another vehicle deemed to be in a reasonable condition.

[211] Given this context, I took the view that the petitioner's persistent demand for the Porsche was unjustified. At this point, it was imperative to remind parties that leveraging material demands to exert emotional leverage or as a means of manipulation would have detrimental effects and introduce unfair dynamics into the proceedings.

[212] Moreover, the pursuit of expensive assets from a former spouse post-divorce could detract from the principles of financial independence and self-reliance. Such demands could impede personal progress and the cultivation of a self-sufficient and healthy life post-separation.

[213] In the present case, the respondent had communicated to the court the importance of the Porsche in his professional endeavors as a businessman. He articulated that the vehicle serves as more than just a means of transportation; it is a symbol of success, financial robustness, and a commitment to quality. These aspects are particularly crucial in sectors where business relationships, negotiations, and client perceptions can be significantly influenced by such outward indicators of professional standing and reliability.

[214] I found myself in agreement with the respondent concerning the matter of the car. Moreover, the petitioner was afforded the freedom to select from an array of vehicles owned by the respondent, as listed in Table E below:

Table E

No	Particulars
1	Car: Reconditioned Porche Macan 2015 model
2	Car: KIA Sportage
3	Car: Proton X50 1.5 TGDI Flagship
4	Motorcycle: Demak Ezio 100
5	Car: Hyundai Santa Fe
6	Car: Hyundai Veloster 1.6 AT
7	Car: Naza Citra II A
8	Car: Mitsubushi Pickup L200 Triton (A)
9	Motorcycle: Kriss

[215] Considering the available selection, the Kia Sportage emerged as a notably adequate choice for the petitioner, especially since the petitioner would assume sole responsibility for its maintenance, post-divorce.

[216] Additionally, a disagreement arose regarding the registration number assigned to the Kia Sportage. The respondent had acquired a distinct registration number for the vehicle, which the petitioner sought to claim. However, I was of the view that such a demand from the petitioner was unwarranted. Therefore, I ruled in favor of allowing the respondent to retain the unique registration number, while mandating the transfer of the Kia Sportage to the petitioner with a new registration number within one week from the date of this decision, delivered on 20 February 2024.

Whether petitioner entitled to half of the value of companies' assets

[217] Regarding the petitioner's claims on the assets owned by companies in which the respondent held shares, such claims were deemed untenable. The assets in question are legally owned by the companies themselves. Grounded in the principle of corporate personality, which distinguished the company's assets from those of its shareholders, the petitioner lacked a legitimate claim to these assets.

[218] The petitioner had attempted to substantiate her claim by asserting that she had contributed to the companies by traveling overseas to source merchandise for the respondent's stores. However, there was no concrete evidence adduced to support this assertion. It appeared that the petitioner's travels were primarily in accompaniment of the respondent and did not contribute at all to the business operations of the stores owned by the companies.

[219] Nonetheless, I was of the view that the respondent's shares in these companies should be subject to equitable division. It was my decision that 20% of the value of the respondent's shares be allocated to the petitioner, with this arrangement also encompassing any shares the petitioner already possessed within any of the companies.

[220] In addition, both the petitioner and the respondent were required to reach an agreement regarding the selection of a valuer for the shares as the petitioner was to pay half the costs of such valuer. The determined portion of the shares was to be compensated to the petitioner within nine months from the date of this decision, namely, 20 February 2024. The relevant companies were itemised in Table F for reference:

Table F

No	% of respondent's shares	Particulars of Property
1	100	KT Land Sdn Bhd
2	100	Fesyen Seri Intan Sdn Bhd
3	50	Lambung Mutiara Antik Sdn Bhd
4	60	Pustaka Seri Intan Sdn Bhd
5	50	Bakti Semerbak Sdn Bhd
6	20	Seri Intan Land Sdn Bhd
7	36	Pustaka Seri Intan (Dungun) Sdn Bhd
8	47	Pasaraya Seri Intan Land Sdn Bhd

Whether respondent entitled to recovery of jewellery

[221] With regard to matrimonial assets, the respondent claimed that there was jewellery taken by the petitioner from the safe in the matrimonial home,

which the respondent now demanded. I found the respondent's contention bereft of merit as there was no proof whatsoever of the existence of such jewellery, much less that the petitioner had taken them. As such, this claim could not be allowed.

[222] On this note, I drew guidance from the case of *Muthuraja a/l Suppiah v Sukumar Kokila* [2020] MLJU 2337; [2020] 1 LNS 2183; [2020] 1 MLRHU 1820, where it was stated in the following passage:

> The last item in contention was that of some jewellery itemised by the respondent which she sought the return of from the petitioner. Unfortunately, *the respondent could not provide any cogent evidence that the said items were being held by the petitioner*. Such being the case, this court declines to make any order with regard to this issue. (Emphasis added.)

CONCLUSION

[223] In the upshot, therefore, and based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, and written and oral submissions of both parties, the following was ordered.

[224] The divorce was granted, with the decree nisi made absolute immediately. No damages were awarded against the co-respondent. The respondent was ordered to pay a monthly amount of MYR10,000 for spousal maintenance and a total of MYR6,000 for child maintenance for two children. The matrimonial assets, which included the immoveable properties, vehicles, monies, and shares in the companies were to be divided accordingly, as explained above. parties were to bear their own costs and a penal endorsement was to be inserted in the court order.

Divorce allowed with decree nisi made absolute immediately.

Reported by Ahmad Ismail